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CASES DETERMINED

BY THE

c.

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

# COURTS OF APPEALS

OF THE

STATE OF MISSOURI

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REPORTED FOR THE

ST LOUIS COURT OF APPEALS

February 1, 1910, to April 5, 1910,

*By Thomas E. Francis of the St. Louis Bar,*

FOR THE

KANSAS CITY COURT OF APPEALS

*By John M. Cleary of the Kansas City Bar,*

AND FOR THE

SPRINGFIELD COURT OF APPEALS

*By Lewis Luster of the Springfield Bar,*

OFFICIAL REPORTERS.

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**JUDGES OF THE**  
**ST. LOUIS COURT OF APPEALS.**

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HON. RICHARD L. GOODE,        }  
HON. ALBERT D. NORTON,       } *Judges.*

JOSEPH FLORY, *Clerk.*

THOMAS E. FRANCIS, *Reporter.*

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**JUDGES OF THE**  
**KANSAS CITY COURT OF APPEALS.**

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HON. JAMES M. JOHNSON,        } *Judges.*

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**JUDGES OF THE**  
**SPRINGFIELD COURT OF APPEALS.**

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HON. HOWARD GRAY,                } *Judges.*

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**CASES DETERMINED**

**BY THE**

**ST. LOUIS, KANSAS CITY AND SPRINGFIELD**

**COURTS OF APPEALS**

**AT THE**

**MARCH TERM, 1910.**

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*(Continued from Volume 147)*

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**NATIONAL BANK OF COMMERCE IN ST. LOUIS,  
Appellant, v. MECHANICS' AMERICAN NA-  
TIONAL BANK and ST. LOUIS BREWING AS-  
SOCIATION, Respondents.**

**St. Louis Court of Appeals. Argued and Submitted March 14, 1910.  
Opinion Filed April 5, 1910.**

1. **BILLS AND NOTES: Negotiable Instrument Law: Time of Taking Effect.** The General Assembly which enacted the "Negotiable Instrument Law" (Acts 1905, p. 243), having adjourned March 18, 1905, and the act containing no emergency clause, and its operation not being postponed beyond the constitutional ninety days, it became effective June 16, 1905.
2. ———: ———: **Payment is "Acceptance."** The payment of a check or bill of exchange by the drawee is equivalent to its "acceptance," under section 188 of the Negotiable Instrument Law, which provides that "where the holder of a check procures it to be accepted or certified, the drawer and all endorsers are discharged from liability thereon."

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3. ———: ———: **Payment of Forged Check: No Right of Recovery Against Endorser.** Under sections 62, 185 and 188 of the "Negotiable Instrument Law," a drawee who pays to a bona fide holder of a check, to which the drawer's name has been forged, the amount of the same, cannot recover such amount from the holder, the latter not being bound to determine at his peril that the drawer's signature was forged and the genuineness of that signature being vouched for by the drawee when it cashed the check.
4. ———: ———: **Payment of Check.** The endorsement and presentation of a check by the holder and its payment by the drawee do not constitute a negotiation of the check, but constitute a payment.
5. ———: **Payment of Forged Check: Banks: Clearing House Rules.** Under a clearing house rule, providing that all checks received at the clearing house, and not returned to the clearing bank on the same day before 2 o'clock, shall be deemed to have been paid with like effect as though they had been paid in currency at that hour by the bank on which they were cleared, a bank which did not return within the required time a check presented by another bank for payment was chargeable with the consequences of disregarding the rule, and could not recover the amount paid thereon, though the check was forged and the payee bank was not injured by the delay.

Appeal from St. Louis City Circuit Court.—*Hon. Matt. G. Reynolds*, Judge.

**AFFIRMED.**

*Geo. L. Edwards* and *Edward D'Arcy* for appellant.

(1) The rule that a drawee is presumed to know the signature of his drawer, and that if he pays money on a forged check, to a bona fide holder, he cannot recover it, does not apply to a case where the holder has himself been negligent in taking the check, and has thereby led the drawee to relax his vigilance. *Ellis & Morton v. Insurance & Trust Co.*, 4 Oh. St. 628; *Bank v. Bangs*, 106 Mass. 441; *Bank v. Ricker*, 71 Ill. 439; *Goddard v. Bank*, 4 N. Y. 147; *Bank v. Bank*, 151 Mass. 280; *Bank v. Salem*, 17 Mass. 33; *Rouvant v. Bank*,

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63 Tex. 610; Bank v. Bank, 4 Ind. App. 355; Bank v. Saving & Trust Co., 2 Dill (U. S.) 11. (2) The mere fact that plaintiff cannot show conclusively that the names of the payees of the checks in suit are names of fictitious persons, will not defeat recovery, the evidence being that these payees were not employees of the car company, and are unknown persons, and that no such checks were ever issued by the car company. Bank v. Bank, 151 Mass. 280. (3) Where a bank endorses a check drawn on another bank and which it has received from a customer, "for collection," and forwards it to the drawee bank for payment, it does not thereby assert the genuineness of the instrument, but where the indorsement is general, it does assert such genuineness, and the drawee is entitled to rely on such assertion. Bank v. Bank, 107 Mo. 402; Bank v. Bank, 40 Ill. App. 640; Ford v. Bank, 10 L. R. A. (N. S.) 63 (74 S. Car. 180); Bank v. Bank, 4 Ind. App. 355; Bank v. Bangs, 106 Mass. 441; Bank v. Bank, 45 Tex. 203; Turnbull v. Bowyer, 40 N. Y. 456; Fuller v. Smith, 1 Car. & P. 197, Ryan & M. 49. (4) Unless the drawee's mistake as to the signature of the drawer has caused the holder some loss, the drawee should not be held absolutely to a knowledge of his correspondent's signature. Morse Banks & Banking, p. 834 (4 Ed.); McKleroy v. Bank, 14 La. An. 458; Bank v. Bank, 4 Ind. App. 355 (defendant's indorsement tended to throw plaintiff off guard, but defendant was not negligent); Chitty on Bills, 485; Bank v. Bank, 108 N. W. (N. Dak.); 10 L. R. A. (N. S.) 49. (5) There is no presumption that the defendants have been injured by the length of time which elapsed between the payment of the checks on August 15th, and the notification of the forgery on September 11th or 12th. If any injury resulted to defendants by reason of this delay, the burden is upon them to prove it. McKeen v. Bank, 74 Mo. App. 281; Wind v. Bank, 39 Mo. App. 72; Investment Co. v. Bank, 96 Mo. App. 125; Koontz v. Bank, 51 Mo. 275; United

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**States v. Bank**, 141 Fed. 209; **Daniel Neg. Inst.**, sec. 1372, n. 18, citing **Bank v. Allen**, 59 Mo. 310; **Bank v. Bangs**, 106 Mass. 441. (6) If a check is paid through the clearing house and the drawee discovers it has no funds, it may return the check, even after the hour set by the clearing house rules, if the payee bank has not lost its rights by the delay, or altered its position. **Bank v. Bank**, 101 Mass. 281; **Bank v. Bangs**, 106 Mass. 441; **Bank v. Bank**, 139 Mass. 513. If such recovery be allowed in case of mistake as to sufficiency of funds, much more should be allowed in case of forged paper, etc. **Morse on Banks and Banking**, sec. 464, p. 827. (7) Even where the bank and its customer agree upon a time, say, ten days, within which checks must be returned, this is not necessarily conclusive. **McKeen v. Bank**, 74 Mo. App. 281. The two o'clock clearing house rule was treated as immaterial in **Bank v. Bank**, 107 Mo. 409. (8) The law presumes "that those engaged in a given trade or business are acquainted with the general customs and usages of the business, where it is carried on, and with such other facts as are necessarily incident to the proper conduct of the business." **Jones, Ev.**, sec. 51, n. 1, citing **Young v. Turing**, 2 Man. & G. 593-603; **Hinckle v. Kersting**, 21 Ill. 247; 74 Am. Dec. 102; **McAllister v. Raib**, 4 Wend. 483; **Mills v. Bank**, 11 Wheat. 431; **Sutton v. Tatham**, 10 Adol. & Ell. 27; **Given v. Charron**, 15 Md. 502; **Pittsburg v. O'Neil**, 1 Pa. St. 342; **Rindskoff v. Barrett**, 14 Ia. 101. (9) Parties to commercial paper are bound by general customs, such as the custom among drawee banks to rely upon the vigilance of prior parties in identifying people. "It is a great error to suppose that the drawee of a bill or check is bound to rely alone upon a knowledge of the handwriting of his customer or correspondent." **Ellis v. Ins. & Trust Co.**, 4 Oh. St. Rep. 628.

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*Johnson, Houts, Marlatt & Hawes* for respondents.

(1) The appellant as the depository of the St. Louis Car Company was bound to know its depositor's signature, and cannot recover from bona fide holders for value the amount of forged checks paid to them. *Price v. Neal*, 3 Burrows 1355; *Bank v. Bank*, 107 Mo. 402; *Stout v. Benoist*, 59 Mo. 281; *Bank v. Bank*, 107 Iowa 329; *Bank v. Bangs*, 106 Mass. 444; *Bank v. Bank*, 177 Mass. 392; *Bank v. Boutell*, 60 Minn. 191. (2) The application of this rule of law to the facts in this case necessitates affirmance of the judgment in favor of the German American Bank and Bremen Bank. (3) The same rule requires an affirmance of the judgment in favor of the Gast Brewing Company. (a) There is no evidence of negligence on the part of the Gast Brewing Company in cashing the checks in controversy or any checks of the car company. (b) The active, positive negligence and carelessness of the appellant and its employees was the sole and only cause of the appellant's loss. (c) The endorsements in this case were restrictive and in no sense gave currency to the checks or induced relaxation of vigilance on the part of the appellant. *Bank v. Bank*, 109 Mo. App. 665; *Bank v. Bangs*, 106 Mass. 444; *Bank v. Bank*, 107 Mo. 402. (4) The rule in *Price v. Neal*, is independent of and does not rest upon any change in condition or prejudice to the position of the party cashing the check, by reason of the failure of the drawee to detect the forgery. *Bank v. Bank*, 107 Mo. 402; *Neal v. Coburn*, 92 Me. 149. (5) There was no proof that the names of the payees in the checks in controversy were forged. But if they were, the loss to the appellant did not result from that, but from the forgery of the maker's name. *Bank v. Bank*, 107 Iowa 330.

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*Geo. R. Lockwood* for respondent bank.

(1) A bank is bound to know the signature of its customer to checks drawn on it and it must bear the loss of a forgery on it in the name of its customer, unless there is some cogent reason for shifting the loss to another, and the drawee bank must assume the burden of showing such reason. This is as favorable a statement of the law in this case as will be found in any of the decisions of this State and is fully sustained by the following cases, which establish the rule in this State. *McKeen v. Bank*, 74 Mo. App. 281; *Invest. Co. v. Bank*, 96 Mo. App. 125; *Invest Co. v. Bank*, 103 Mo. App. 613; *Bank v. Bank*, 107 Mo. 402. (2) The following cases either affirm the rule as just stated, or declare, unequivocally, and without qualification, the doctrine that drawee bank must know the signature of its customer and that such has been the law since 1762. *Bank v. Bank*, 177 Mass. 392; *Neal v. Coburn*, 92 Mo. 139; *Bank v. Bank*, 59 Oh. St. 207; *Bank v. United States*, 151 N. R. 402; *Cooke v. United States*, 91 U. S. 389 (396); 7 Century Digest, Bills and Notes, secs. 1272-3; *Bank v. Bank*, 115 Tenn. 64; *Bank v. Bank*, 30 Md. 11. (3) The checks being payable to fictitious persons, were payable to bearer at the common law which obtained in this State in August, 1905, at the time of the payment of the checks in question. *Story, Promissory Notes*, sec. 132. Furthermore, the alleged forgeries of the payees' names were not the cause, either proximate or remote, of the injury or loss complained of, and therefore there can be no recovery in this action because of such alleged forgeries.

*Edw. C. Kehr* for respondent, St. Louis Brewing Association.

(1) The bank is bound to know the signature of its depositor. In paying a check, it acts at its peril and pays out its own funds. *Stout v. Benoist*, 39 Mo. 277;

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Bank v. Bank, 107 Mo. 402; McKeen v. Bank, 74 Mo. App. 281; Inv. Co. v. Bank, 96 Mo. App. 125; Inv. Co. v. Bank, 103 Mo. App. 613; Bank v. Bank, 109 Mo. App. 672; Bank v. Bank, 177 Mass. 392. (2) At the time appellant paid the checks it had in its possession the evidence that they were forgeries. (3) The checks were indorsed by the payees therein named and thus indorsed, were sold and delivered to the respondent, brewing association, the latter paying full value for them. The indorsement of the respondents on the checks was solely for the purpose of collection as appellant well knew.

STATEMENT.—The petition upon which this case was tried as well as the other case hereinafter referred to, the latter differing from this only in the names of the defendants and in the number of checks and in the amount, consists of two counts. By the first count it is charged that on or about the 15th of August the defendants presented to plaintiff for payment fourteen certain pretended checks, each dated the 12th day of August, 1905, for various amounts, aggregating the sum of \$549.25, each purporting to have been drawn on plaintiff by the St. Louis Car Company, to have been signed by said company by its president and its assistant secretary, and each purporting to be endorsed by the payee therein, each of which was endorsed by the defendants or by others and then by the defendants; that defendants represented to plaintiff that the checks were the genuine checks of the St. Louis Car Company, as they purported to be, and requested plaintiff to pay the same; that when the checks were purchased or otherwise acquired by the defendants "they negligently made no inquiry and took no action whatever to ascertain whether or not said checks were in fact the genuine checks of the St. Louis Car Company as they purported to be;" that they were endorsed by the defendants and presented to plaintiff for payment through the clearing

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house of the city of St. Louis, all being presented together, and that believing the representation of the defendants that the checks were the genuine checks of the car company and such appearing to be the case from such inspection of the checks as plaintiff was able to make under the circumstances and at the time they were presented for payment by the defendant bank and not knowing otherwise but relying upon the genuine endorsements thereon of the defendants, which also led plaintiffs to believe them genuine, plaintiff paid them to the defendant, the Mechanics American National Bank; that all of the checks were forgeries and not the genuine checks of the St. Louis Car Company, as represented by the defendants and as they purported to be, and were wholly worthless and valueless to the plaintiff; that the fact that the checks were forgeries was not discovered either by plaintiff or by any other person until on or about the 11th or 12th of September, 1905, and that immediately upon discovering that the checks were forgeries, plaintiff notified defendants of the fact and demanded refund of the amount of money paid which defendants failed and neglected and refused to do. It is further averred that the position of the defendants was not altered or changed and that the defendants had sustained no damage as the result of plaintiff's paying the checks to the defendant Mechanics American National Bank as requested by defendant at the time it notified defendants that the checks were forged and demanded a refund of the money, wherefore judgment is demanded for the amount of the checks, \$549.25, with interest and costs. The second count is practically the same with the exception that it states that each of the checks purported to be endorsed by the payee therein and each of them was endorsed by the defendant St. Louis Brewing Association and by others and that the defendant represented to plaintiff that the checks were the genuine checks of the Car Company and that each of the checks was endorsed by the genuine signature of the



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payee named therein as endorser thereof as is purported to be; "that when said checks were purchased or otherwise acquired, by the defendants, they negligently made no inquiry and took no action whatever, to ascertain whether or not said checks were, in fact, the genuine checks of the St. Louis Car Company, as they purported to be, or whether the aforesaid endorsements thereon, were the genuine endorsements of the parties whose names appeared thereon;" and it is averred that the endorsements of the payees and other parties thereon as endorsers thereon "are not the genuine signatures of said payees, as represented by the defendants, and as they purport to be, and all are wholly worthless and valueless to the plaintiff." The other allegations are practically as in the first count of the petition.

The answer of the defendant bank admits the incorporation of the various parties, avers that the defendants believed the checks to be genuine and valid and that they had been duly endorsed by the payees named therein as payees and so believing deposited the checks to the credit of the defendant bank on current account; that they did this in good faith and in the belief that the checks were the checks of the Car Company and duly endorsed by the payees therein named and that in due course they presented the checks to the plaintiff bank for payment, through the clearing house association, in the usual and customary manner of collecting checks between banks in the city of St. Louis; that they were examined by the employees of the plaintiff and held by them to be the genuine checks of the Car Company and defendant's account was credited with the aggregate amount of the checks; that the plaintiff and defendant were at the time of the presentation of the checks members of the Clearing House Association of the city of St. Louis, and the rule of the Clearing House Association hereafter referred to is set up, it being averred that the plaintiff did not return defendant the checks on or before two o'clock of the day on which

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they were presented to plaintiff for payment through the Clearing House Association and did not inform defendant that the checks were as plaintiff alleges forgeries and not genuine checks of the Car Company or endorsed by the payees thereof until on or about the 11th or 12th of September, 1905, which defendant says was the first and only information that it had that the checks were not the genuine checks of the Car Company or endorsed by the payees thereof; denies making any representations as to the genuineness of the signatures; denies knowledge and information as to whether they were forgeries and denies negligence. The answer to the second count is practically the same, with the denial of any knowledge or information as to the forgery of the names of the endorser.

The answer of the Brewing Association was a general denial except as to admissions of corporate capacity and that the Car Company was a depositor and customer of the plaintiff and engaged with plaintiff in the business usual and customary between banker and depositor.

Demurrers to the petition were interposed which were overruled. The reply was a general denial. Trial was had before the court, a jury being waived, this case being tried in the lower court and submitted and argued before us in connection with another case in which the National Bank of Commerce in St. Louis is plaintiff and appellant, and the German American Bank, the Bremen Bank and the Gast Brewing Company are defendants and respondents. As the facts which underlie the transactions involved are identical in the two cases, change of parties and of names only and of the number of checks distinguishing one from the other, the statement which we make for brevity and convenience as well as an intelligent understanding of the matter will cover the facts in both cases. With some changes we are following the statement of counsel for one of the respondents, as to the facts in evidence at the trial.

The works of the St. Louis Car Company are located in the extreme northern end of St. Louis and at a distance of at least seven or eight miles from the Bank of Commerce. At the time in question, the Car Company employed several thousand men, whose wages it paid twice a month in checks drawn on the appellant. Every other Saturday, after working hours, and therefore, after banking hours was pay-day. These checks were not presented to the bank by the individuals to whom they were issued, but being indorsed in the name of the payee, they were cashed by the grocers and saloon keepers in the neighborhood and the brewery salesman, who, on such occasions, appeared at the place of business of their customers. In cashing these checks, the workmen were arranged in line, and as each man presented his check it was examined, and if found to be endorsed in the name of the payee, it was cashed. The men presenting these checks wore the clothes and had the appearance of men who had just come from their work at the shops. No particular identification of any one man, as payee, was had or attempted, the presence of the men in the line of workmen and in the garb of the other workmen and no question being made by others in the line or present as to their being part of the working force being accepted as sufficient identification. On the 12th day of August, 1905, the St. Louis Brewing Association cashed a number of Car Company checks presented in this way; among them were 14 checks, seven or eight of which were bought direct by the brewery, the remainder being sent in by its customer, Daubendieck, in payment of his account. The brewery paid the full face value of these checks without any knowledge or suspicion that the signature of the Car Company was forged or that the party named as payee in the check was not its rightful owner.

Each of these fourteen checks is endorsed in the name of the payee therein named and the endorsee received its face value for it. The Brewing Association

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having thus acquired these checks, deposited them with its co-defendant, the Mechanics American National Bank and the latter presented them, through the clearing house, to the appellant for payment. The endorsement on the checks by the respondents will be stated later.

Forty-two checks in all, alleged to be forgeries (fourteen in this case and twenty-eight in the other) were presented to the appellant for payment by the clearing house on Tuesday, August 15, 1905, twenty-eight of them being those involved in the other case. They were taken to the Bank of Commerce in one or more bunches or bundles, and there came under the observation of an assistant cashier, or his assistant, of the bookkeeper and of the paying teller of the bank. There seemed to these officers to be an irregularity in the signature of Mr. Phelps, the assistant secretary of the Car Company. The signature looked suspicious to them. Each of the four bank officers examined it, but made no examination beyond that. They did not open the bundles, did not examine the quality of the paper, nor the workmanship of the checks, did not examine the wood cut of a car on the end of the check nor the numbers upon the checks. In the bundles containing the spurious checks were several hundred genuine checks. Upon the witness stand the assistant cashier unhesitatingly pronounced the forty-two checks to be forgeries. As he produced each check, he pronounced the signature of the Car Company to be a forgery. He said: "There are only three numbers on these forty-two forged checks, that is, they are all B98360, 98530 or 98630, so that in the forty-two checks these numbers are repeated 8 or 10 times."

The Clearing House rule prevailing in the Clearing House in St. Louis, of which association all of the banks involved are members was pleaded in the answers and put in evidence. That rule is as follows:

"All checks or other items received at the Clearing House and which shall not be returned to the clearing bank or trust company on the same day before two

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o'clock, shall be deemed to have been paid with like effect as though such check or other item had been paid in currency at that hour over the counter by the bank or trust company on which it was cleared; and therefore the responsibility of the bank or trust company through which said item is passed, shall cease as completely as though said check or item had been in fact paid out in currency over the counter by the bank or trust company on which it was cleared. On half-holiday Saturdays the time for returning the items shall not be later than eleven o'clock a. m. on the same day."

The evidence in the case further shows that there is a custom in the city of St. Louis among the banks requiring every person cashing a check to identify the holder of it as the person named in it, and that in cashing clearing house items, as these checks are called, the drawee bank relies largely upon endorsements and no difference is shown between Clearing House endorsements and other unrestricted endorsements. The statement as to what took place at the appellant bank as set out by counsel for appellant is as follows:

When the forged checks in question came to the appellant, though the Clearing House, on the morning of August 15, 1905, they were, together with a large number of genuine checks of the Car Company, and of other depositors, examined by the assistant cashier and his assistant. These examiners noticed an irregularity about some of the signatures of the name of W. B. Phelps on the checks, and called the attention of the paying teller to them. He concluded, after examining them, that they were all right, remarking that men's signatures are likely to vary in signing large numbers of checks.

Taking by way of illustration a check drawn on the plaintiff bank reading, "Pay to the order of W. Clarke," and purporting to be signed by the Car Company, it was endorsed, "W. Clarke. Pay to the order of Mechanics-American National Bank. Hyde Park Brewery, C. Mar-

quard Forster, Mgr. St. Louis Clearing House. Aug. 15, 1905. Mechanics American National Bank. 32. All prior endorsements guaranteed." This latter was stamped, the 32 being the clearing house number of the Mechanics American National Bank. In the case against the German American Bank et al., the endorsements following that of the named payee—which latter was in blank as in the other case—are "Gast Brewing Company. German American Bank. St. Louis Clearing House, August 15, 1905. 13. All prior endorsements guaranteed." In both cases this latter appears to have been the stamp of the Clearing House.

Going somewhat more fully into the manner in which the checks came into possession of the brewing companies, it appears that the Car Company pays off its employees twice a month. The agents of the brewery would take a certain amount of money, say twenty-eight to thirty thousand dollars and go to different saloons in the neighborhood of the Car Company plant and cash the checks for the Car Company's employees as they came in. There were hundreds of the employees, who would come in and be paid off one at a time as they came along. Each man would hand in his check. They were not known personally to the brewery agents—no questions asked as to who they were, simply compared the endorsement with the name on the face of the check—of course noting that the check was signed by the assistant treasurer of the Car Company and noting its general appearance. Did not know the signature of the payee and endorser and made no inquiry. This practice had been carried on for several years. The checks when cashed in the saloons were turned into the breweries. This was the testimony as to the Gast Brewing Company. Some of the checks apparently came to the breweries through their customers, without endorsement, however, by the latter, all of them having been taken up about as above described. There is no evidence in the case showing that the first endorsers of these checks

were not the persons whose names appeared therein as payees. All that appears as to that is that no such persons who are named as payees and who endorsed are or then were employees of the Car Company.

At the conclusion defendants interposed what were practically demurrers to the evidence, on the ground that plaintiff, under the law and the evidence, was not entitled to recover against the defendants. These were sustained. Judgment went accordingly in favor of the defendants. Plaintiff in due time filed its motions for new trial which being overruled and exceptions duly saved throughout, appeals were duly perfected to this court.

REYNOLDS, P. J. (after stating the facts).—By act of the General Assembly of this State, approved April 10, 1905, what is called "The Negotiable Instrument Law," was adopted in this State. See Sess. Acts, 1905, p. 243. The Forty-third General Assembly which adopted this Negotiable Instrument Law adjourned on the 18th day of March, 1905. There is no emergency clause in this act, nor, by any section or provision in it, is its operation postponed beyond the constitutional period of ninety days. Consequently it was in effect June 16, 1905. The checks in suit bear date August 12th and were cashed by the plaintiff bank August 15, 1905. That act, by section 196, provides that "in any case not provided for in this act, the rules of the law merchant shall govern." All acts in connection with these checks are, therefore, to be construed, and the character and rights of the parties to them are determinable under the provisions of this Negotiable Instrument Act of this State, provided they are such as are covered by it. We call attention to this for the reason that all of the counsel in the case seem to have lost sight of it, one of them even stating that at the time of the transaction the common law, meaning "Law Merchant,"

then obtained in this State and that that law is to be applied in the determination of the questions arising in this case. We do not think so; on the contrary, we think that this whole transaction falls within our Negotiable Instrument Law of 1905. Section 62 of that law treating of bills of exchange and promissory notes, reads: "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits: (1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and (2) the existence of the payee and his capacity to indorse." Section 185 of the same act provides that a check is a bill of exchange drawn on a bank payable on demand, and except as in the act otherwise provided, the provisions of the act applicable to a bill of exchange payable on demand apply to a check. Section 188 reads: "Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon." The payment of a check or bill of exchange by the bank upon which it is drawn is equivalent to its acceptance. In view of this law of our State, there is no necessity for an elaborate discussion of the questions which have grown out of transactions occurring prior to its adoption by our State. Two lines of decision, each line emanating from courts of the highest authority and most reputable standing for judicial learning, have followed through this class of cases. One line, tracing its origin to the decision of Lord Mansfield in the case of *Price v. Neal*, 3 Burr. 1354, holds without qualification to the rule that when the drawee of a check, to which the name of the drawer has been forged, pays it to a bona fide holder, he is bound by the act and cannot recover the payment. This on the rule that the drawee of a bill of exchange, check or draft is bound to know the handwriting of his customer, the drawer, and if he accepts or pays a bill check or draft in the hands of a bona fide holder for value, he is concluded by the act,



although it turns out that the signature of the drawer is a forgery, and having paid or accepted it, he can neither repudiate the acceptance nor recover the money paid. The other line, and because of comparatively late origin, or more accurately, announcement, sharply challenges this, and as said by an accepted authority on banks and banking in treating of it, 2 Morse (4 Ed.), sec. 464, "This doctrine is fast fading into the misty past where it belongs." The co-called modern rule is that one who purchases a check or draft is bound to satisfy himself that the paper is genuine and that by endorsing it or presenting it for payment or putting it into circulation before presentation, he impliedly asserts that he has performed this duty. Consequently it is held in this line of cases, that if it appears that he has neglected this duty the drawee, who is without actual negligence on his part and who has paid the forged paper, may recover the money paid from such negligent purchaser. The recovery is permitted in such cases sometimes on the ground that although the drawee was constructively negligent in failing to detect the forgery, yet if the purchaser had performed his duty the forgery would in all probability have been detected and the fraud defeated, and again on the ground that he has received money to which he is not entitled. As stated by the able counsel for appellant this modern rule does not always apply the rule of Price v. Neal to a case where the holder has himself been negligent in taking the check and has thereby led the drawee to relax his vigilance. One of the earliest cases so holding is that of the Gloucester Bank v. Salem Bank, 17 Mass. 32. Another is Ellis & Morton v. Ohio L. Ins. & T. Co., 4 Ohio St. 628. The cases illustrative of these two lines of decision are so fully compiled in 10 Lawyers' Reports, Annotated, New Series, p. 49 *et seq.*, in annotation of the case of First National Bank of Lisbon v. Bank of Wyndmere, 15 N. Dak. 299, which case follows the latter line of decisions, that

we can do no better than refer to that work for reference to the conflicting cases. It is to be noted that the so-called modern cases or what is a more proper denomination, the new rule cases, do not appear to notice the effect on the Price v. Neal rule of the Negotiable Instrument Law, although many of our states—thirty-five or more—have adopted it since it was drafted in 1895, practically in the form adopted by us. The courts following the new rule have frequently proceeded upon the idea that recovery could be had in case of payment of forged paper on the ground, to put it briefly, that it had been paid by mistake of fact, a rule denied in the cases which follow Price v. Neal. It is also to be remarked that the author of the notes to First National Bank of Lisbon v. Wyndmere, 10 L. R. A. (N. S.) 49, before referred to, does not notice the Negotiable Instrument Law, nor is it noticed in the annotated case although North Dakota appears to have adopted the law between 1897 and 1902. See Crawford Ann. Neg. Ins. Law (3 Ed.). The doctrine applicable in cases of negligence is also invoked in these new rule cases, that as between two innocent parties he through whose negligence the act first occurred is the one to suffer. Nearly the identical questions here involved have very lately been before the Springfield Court of Appeals, where under the title of National Bank of Rolla v. First National Bank of Salem, 141 Mo. App. 719, 125 S. W. 513, a very elaborate and learned discussion will be found. Judge GRAY, writing the opinion in that case, held, after an examination of the cases and in the light of our Negotiable Instrument Act, that where the payee bank pays a check to another bank, which is a bona fide holder, such drawee cannot recover the money back on discovering such check to be a forgery. The only material difference between that case and the cases now before us is that in the case before the Springfield Court of Appeals negligence was neither pleaded nor in issue. Here it is. Judge GRAY first disposing of the question on principle and on the authori-

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ties, and independent of the statute, follows the rule in *Price v. Neal*. He further holds that in the adoption of our Negotiable Instrument Law, we have adopted the rule announced in *Price v. Neal*. The State of New York has adopted this same Negotiable Instrument Act and in the case of *Title Guarantee and Trust Co. v. Haven*, No. 2, 126 App. Div. (1908) 802, the Supreme Court of that state, in an opinion by Judge INGRAHAM, passing upon sections similar to the ones which we have quoted from our law, construes them as making it conclusive upon the drawee after acceptance that the note was genuine and the endorsements and all prior endorsements assured. That is to say, the Supreme Court of New York in this case recognizes that in the adoption of this Negotiable Instrument Act the State of New York had adopted to its fullest extent the rule announced in *Price v. Neal*, the court quoting from *National Park Bank v. Ninth National Bank*, 46 N. Y. 77, that "for more than a century it has been held and decided, without question, that it is incumbent upon the drawee of the bill, to be satisfied that the signature of the drawer is genuine; that he is presumed to know the handwriting of his correspondent; and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act and can neither repudiate the acceptance nor recover the money paid." Quoted approvingly in *Bank v. Bank*, 107 Mo. 402, 17 S. W. 982. See also *Bank v. Bank*, 109 Mo. App. 665, 83 S. W. 537. Taking the same view of our Negotiable Instrument Law as that taken by the Springfield Court of Appeals in the *National Bank of Rolla v. First National Bank of Salem* case, and by the Supreme Court of New York in the case of *Title Guarantee and Trust Co. v. Haven*, No. 2, we hold that when our State adopted the Negotiable Instrument Law it adopted the rule announced in *Price v. Neal*. We are therefore not called upon to inquire into the soundness of that rule or whether modern decisions have overturned it. We are bound to it by force of our own statutory law.

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✓ This disposes of the main contention. But it is urged that negligence on the part of defendants has been proven, and that even the cases which follow *Price v. Neal*, recognize negligence on part of the holder as taking the case out of the rule. It is not necessary to discuss the proposition of law involved. The negligence here relied on is in the failure to identify the payees as the real parties named as such. But there is no probative evidence that they were not the very parties named in the checks as payees. The defendants' agents were not bound to determine at their peril that the signature of the drawer was forged. That, under our Negotiable Instrument Law and under *Price v. Neal*, is not negligence. The genuineness of that signature was vouched for by the plaintiff when it cashed the checks. Why should the fact that defendants passed it as genuine be imputed as negligence to them? It was so near the genuine that the officers of the plaintiff bank, the drawee, accepted and cashed the checks upon which it appeared as genuine. Nor do we think that endorsements and presentation of these checks to the plaintiff bank was in any sense a negotiation of them. They were presented to the drawee by the defendants for payment, not in the line of negotiation, and they were paid, not bought. Finally, we hold that the appellant bank, under rule 12 of the Clearing House, of which it and the defendant banks were members, and by which they are all bound, was chargeable with the consequences of a disregard of that rule. It is no answer to this to say or prove that no harm resulted to defendants by the delay. The rule makes no such exception. Nor is it an answer here to the charge of disregard of that rule to say that these checks came in in such great number and by one delivery that there was not time to examine and reject these forty-eight. This rule was made by men of long experience in banking, men of great banking acumen. There is no suggestion that it violated any law. It is not possible to believe that in the city of St. Louis, with its wonder-

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ful banking business, it was an uncommon occurrence to have hundreds of checks turned in through the Clearing House at one and the same time. If out of their experience these bankers making their own law, did not think it wise to make an exception to the rule to meet such an event, it is fair to assume that they have concluded that it is not the part of wise and safe banking to make such an exception. As they have made none, we do not think the courts should undertake to do so.

On a careful consideration of the case we hold that under the facts in evidence before the learned trial court, the demurrers were properly sustained and judgment properly entered in favor of the defendants. That judgment is affirmed. All concur.

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NATIONAL BANK OF COMMERCE IN ST. LOUIS,  
Appellant, v. GERMAN AMERICAN BANK et al.,  
Respondents.

St. Louis Court of Appeals. Argued and Submitted March 14, 1910.  
Opinion Filed April 5, 1910.

BILLS AND NOTES: National Bank of Commerce v. Mechanics' American National Bank et al., *ante*, followed.

Appeal from St. Louis City Circuit Court.—*Hon. Matt. G. Reynolds*, Judge.

AFFIRMED.

*Geo. L. Edwards* and *Edward D'Arcy* for appellant.

*Johnson, Houts, Marlatt & Hawes* for respondents.

*Edw. C. Kehr* for respondent St. Louis Brewing Association.

*Geo. R. Lockwood* for respondent bank.

REYNOLDS, P. J.—As stated in the opinion in the case of National Bank of Commerce in St. Louis v. Mechanics American National Bank et al., No. 12019, the facts in this case, with difference in names and number of checks and amount, are practically the same as in that. For the reasons therein stated the judgment in this case is affirmed. All concur.

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WILLIAM STROBEL, Respondent, v. GERST  
BROTHERS MANUFACTURING COMPANY,  
Appellant.

St. Louis Court of Appeals. Argued and Submitted March 9, 1910.  
Opinion Filed April 5, 1910.

1. MASTER AND SERVANT: Injuries to Servant: Sufficiency of Evidence. In an action by an employee for injuries sustained by falling over iron in leaving his place of work, evidence held to warrant a finding for plaintiff.
2. ———: ———: Instruction. In an action against the master by a servant for injuries received in falling over obstructions in the passageway leading from his place of work, an instruction that if the jury believed that on the day mentioned plaintiff was in the employ of the defendant company; that it was necessary for him, at the close of his day's labor, in order to leave the building, to pass through the finish room; that in passing through that room he used the only mode of egress provided by the defendant company for leaving the premises and that he was at the time exercising ordinary care for his own protection; that he slipped upon scraps of iron which were lying upon the floor of the room and thereby broke his knee; and that the presence of the scraps of iron upon the floor was caused by the failure on the part of defendant to exercise ordinary care in order to provide a reasonably safe place whereby the plaintiff could depart from said building, the verdict should be for the plaintiff, did not misdirect the jury and is held to be founded on the testimony.
3. ———: ———: Master's Duty: Ways. A master is liable for injuries to a servant because of incumbered ways; his duty to furnish a safe exit from the place of work being akin to his duty to furnish a reasonable safe place to work.

Appeal from City of St. Louis Circuit Court.—*Hon. Matt. G. Reynolds*, Judge.

**AFFIRMED.**

*Watts, Williams & Dines* and *Wm. R. Gentry* for appellant.

(1) Where the defect complained of is not only "as obvious and open to the employee as to the employer," but, so far as it exists at all, such existence is glaring and palpable, recovery is never permitted. Under such circumstances the employee assumes the risk. *Bennett v. Lumber Co.*, 116 Mo. App. 699; *Berning v. Medart*, 56 Mo. App. 443; *Marshall v. Hay Press Co.*, 69 Mo. App. 256; *Kleine v. Shoe & Clothing Co.*, 91 Mo. App. 102; *Porter v. Railroad*, 71 Mo. l. c. 77; *Railroad v. Everett*, 152 U. S. 107; *Wendall v. Railroad*, 100 Mo. App. 556; *Fugler v. Bothe*, 117 Mo. 475; *Montgomery v. Railroad*, 109 Mo. App. 88; *Glasscock v. Dry Goods Co.*, 106 Mo. App. 657; *Pohlmann v. A. C. & F. Co.*, 123 Mo. App. 219. The foregoing decisions were rendered in cases where the master had furnished the appliances or places to work for the very purpose for which they were being used at the time of injury; the principles announced, by these decisions, therefore should be more strictly applied in the case at bar, where no claim is made that the master provided and piled up the scrap iron to walk over or furnished it for any particular use. (2) Where the servant has the choice of two ways of performing labor, one of which is comparatively safe and the other dangerous and himself selects the latter, he cannot recover for injuries received. *Moore v. Railroad*, 146 Mo. 572; *Montgomery v. Railroad*, 109 Mo. App. 88; 1 *Bailey on Master and Servant*, sec. 1121; *Pohlmann v. Car & Foundry Co.*, 123 Mo. App. 228. The uncontradicted evidence shows that respondent could have gone to the point of his destination without climbing over the scrap iron. He chose the latter course and in-

juries received by him were not caused by any neglect of duty of the master but were purely accidental. (3) Even in cases involving injuries suffered by the servant in the use of appliances furnished by the master for the very purpose for which they were being used, the employer is not an insurer of the sufficiency, nor of the absolute safety of such appliances. *Krampe v. Brewing Assn.*, 59 Mo. App. 277; *Brown v. L. & L. Co.*, 65 Mo. App. 162; *Kelly v. Stewart*, 93 Mo. App. 47; *Breen v. Cooperage Co.*, 50 Mo. App. 202; *Bennett v. Lumber Co.*, 116 Mo. App. 699; *Glasscock v. Dry Goods Co.*, 106 Mo. App. 657; *Browning v. Railroad*, 118 Mo. App. 449. (4) The demurrer to the evidence should have been sustained. *Beebe v. Transit Co.*, 206 Mo. 419. Negligence in this case is not to be inferred from the mere happening of the accident. *Murphy v. Railroad*, 115 Mo. 111; *Harper v. Standard Oil Co.*, 78 Mo. App. 338. (5) Instruction No. 1 should not have been given. (a) There was no evidence that it was necessary for respondent to go through the finishing room. (b) There was no evidence that this was the only mode of egress. (c) There was no evidence that the mere presence of the scraps of iron on the floor of the finishing room at the close of the day's work in any way tended to prove failure of duty on the master's part; in cutting the manufactured product to its final length, size and shape there would necessarily be some such accumulation. (6) There was no evidence that the place in question was unsafe except the mere fact that plaintiff slipped and fell. Such evidence is not sufficient to go to the jury. "*Res ipsa loquitur*" does not apply. *Glasscock v. D. G. Co.*, 106 Mo. App. 664; *Wojtylak v. Coal Co.*, 188 Mo. 260; *Fuch v. St. Louis*, 167 Mo. 620; *Hough v. Austin*, 46 Ohio St. 386; *Cosulich v. Standard Oil Co.*, 122 N. Y. 123; *McGrath v. Railroad*, 197 Mo. 104; *Cothron v. Packing Co.*, 98 Mo. App. 343.



*Adolph R. Grund and Charles P. Williams* for respondent.

(1) No assumption of risk arising from master's negligence. *Obermeyer v. Chair Co.*, 120 Mo. App. 73; *Mack v. Railroad*, 123 Mo. App. 537; *Koerner v. St. Louis Car Co.*, 209 Mo. 157; *Charlton v. Railroad*, 200 Mo. 433; *Kennedy v. K. C. Railroad*, 190 Mo. 424; *Longree v. Jackes-Evans*, 120 Mo. App. 478; *Shore v. Bridge Co.*, 111 Mo. App. 278; *George v. Railroad*, 125 S. W. 209. (2) The duty of the master to furnish a safe place to work includes a safe way of egress and ingress. *Bridge Co. v. Jordan*, 143 Ala. 603; *Syrup Co. v. Carlson*, 47 Ill. App. 178; *Buzzell v. Lacoma Mfg. Co.*, 48 Me. 113, 117; *Hobart v. Iron Co.*, 94 Minn. 257; *Powder Co. v. Earlandson*, 33 Ind. App. 251; *Fitzgerald v. Paper Co.*, 155 Mass. 155; *Ewald v. Railroad*, 70 Wis. 420. (3) Contributory negligence is matter for jury. *Allen v. Transit Co.*, 183 Mo. 411; *Ashby v. Gravel Road Co.*, 99 Mo. App. 186.

REYNOLDS, P. J.—Action by plaintiff to recover damages for personal injuries sustained while in the employ of the defendant, the latter being engaged in the manufacture of architectural iron, carrying on that business in the city of St. Louis, plaintiff at the time of the accident being engaged as a moulder in the establishment. He was at work on the 15th of August, 1907, until about 5 o'clock in the afternoon of that day and in passing from the room in which he was at work, slipped upon some scrap iron lying on the floor of the room through which he was passing and fell, breaking his knee. The petition contains the usual averments of the incorporation of the defendant, the employment of the plaintiff, the duty of the employer to provide a reasonably safe place wherein the employees were required to work and to provide a reasonably safe access to and egress from the place at which they were required to

work and that on account of the failure of the defendant company to furnish plaintiff a reasonably safe passageway or egress from the premises, plaintiff, while leaving the premises of the defendant, sustained the injuries of which he complains. Setting out his expense incurred and suffering sustained, he claims \$20,000 damages.

The answer was a general denial and a plea of contributory negligence. The reply was a general denial.

As the defendant, at the close of plaintiff's testimony and at the close of the testimony in the case, interposed demurrers challenging the presence of any testimony entitling plaintiff to recover, we have examined into it as far as necessary to determine this. As the statement of the respondent is rather more condensed than that of appellant, we follow it substantially in our statement of the facts. Defendant was conducting an iron foundry, engaged principally in manufacturing what is known as architectural iron. The premises consisted of a large building, somewhat longer from east to west than across the north and south. A long partition pierced with two openings run east and west the entire length of the building, the partitioning of the building so arranged as to form a long room on the south side. The eastern end of this room was known as the molding shop and there plaintiff worked. Along the floor of the molding shop were various piles of sand, separated by passageways to allow the molders to move from one point to another. These piles of sand were used in molding the iron, and each pile was technically known as a "floor." At the western end of the molding shop was what is known as the "beam shop" or "structural shop," but it was part of the large molding room proper. Immediately north of this beam shop was a large room known as the "dog house." East of this and occupying the whole northeast corner of the building was a room used partly as a blacksmith shop and partly as a "finish shop." No partition separated these two

divisions. An opening about fifteen or twenty feet wide led from the western part of the molding room north into the "dog house," and another opening of about the same width led from the eastern portion of the molding shop north from the blacksmith and finish shop and an opening led east from the "dog house" from the blacksmith and finish shop. There were two doors in the premises opening out upon the street, both were in the blacksmith and finish shop. One of them was on the north side near the middle of the room and opened out on Cass avenue, the other was on the east side and opened out upon Eighth street. There was another door at the east end of the molding room opening into Eighth street but it is not in evidence that this door was ever opened or used by the employees. The testimony on the part of plaintiff is that it was closed and not used by the employees. When the time came for a workman in the molding room to quit his work, he necessarily went into the room known as the blacksmith and finish room in order to leave the premises. Another reason for this was that the time clock was located in this finish room upon which all employees were required, under penalty of a fine for failure to do so, to register their hour of leaving. In the blacksmith or finish shop there was a forge, a drill press, an anvil and various work tables and benches scattered around. Plaintiff was working here and at 5 o'clock on the 19th of August, 1907, quitting his labor, walked from the molding room north, through the opening leading from the molding room directly into the blacksmith and finish shop. Going to the time clock he walked through a passageway running north and south between some trestles for supporting heavy work and a workbench. It was in this passageway, and while going through it, that he fell, fracturing the femur bone just above or in the right knee joint. When plaintiff started out and got into the blacksmith or finish shop, the passageway on the east side of the room was blocked so that there was no passage

that way. It had always been impossible to go through this eastern passageway. He did not go around through the "dog house" and enter the blacksmith and finish shop that way as there had been "a heat" that day and the passageway through the "dog house" was obstructed with caldrons for melting metal, ladles, flasks, snap boxes, sand piles and crane, and in going out that way there were obstructions of all kinds, such as of cornice iron, nor was it possible to get to the time clock by going that way, as it was blocked off with freshly painted cornices. The evidence, therefore, tended to show that the way that the plaintiff took was practically the only way to get out; he possibly had to do that to register on the clock. The other workmen passed through the same way and the rule and custom was to go straight through the shop. The passageway that the plaintiff used on this occasion was the regular passway used by all the employees; it was two or three feet wide, was piled up with iron, the piles being 8 or 10 inches high and several feet long and extended under the trestles of the table. At the time he fell this stuff was lying there as it had always done; it was piled up in this way with scrap iron and rubbish. The witnesses did not remember that the room used as an exit had ever been cleaned, but the workmen walked over it every night. Some round and flat iron had been received the morning of the accident from the iron store and had been thrown down between the trestles and the work table and this was directly in the passageway that plaintiff took and was somewhere about the point where he fell. The secretary and general manager of the defendant was in the same room when plaintiff fell and had been around the shop that day. Upon seeing that the other ways were blocked, plaintiff thought that it was safe to attempt the regular passageway. He saw the pile of iron and while walking carefully over it both his feet slipped out from under him and his knee struck against some iron. This is practically the evidence on the part of plaintiff, or to

put it more favorably to defendant, there is evidence in the case tending to show the above facts.

On the part of defendant there was evidence tending to contradict the greater part of this, in that it tended to show that plaintiff could have gone out safely by using another exit, that he knew the condition of the premises and hence had assumed the risk attendant upon going through a passageway that he knew was obstructed.

At the instance of plaintiff the court gave an instruction, somewhat modified in form than as requested by plaintiff, to the effect "that if the jury believed that on the day mentioned plaintiff was in the employ of the defendant company and that it was necessary for him, at the close of his day's labor, in order to leave the building, to pass through the finish room; that in passing through that room he used the only mode of egress provided by the defendant company for leaving the premises and that he was at the time exercising ordinary care for his own protection, and that he slipped upon scraps of iron which were lying upon the floor of the room and thereby broke his knee, and that the presence of the scraps of iron upon the floor was caused by the failure on the part of defendant to exercise ordinary care in order to provide a reasonably safe place whereby the plaintiff could depart from said building, the verdict should be for the plaintiff." This was excepted to by defendant. The court refused a request for an instruction in favor of defendant on all the evidence, to which refusal defendant duly saved exception, and of its own motion the court instructed the jury as to the measure of damages, that if they found for plaintiff they would assess his damages at such sum as the jury might believe from the evidence would compensate plaintiff for such expense as he might have incurred for medicines, physicians and nurses and which were made necessary by the injury sued for, and in addition, such sum as the jury might find and believe from the evidence

would fairly compensate him for any permanent incapacity from following his usual occupation as a molder that has been caused directly and proximately by the injury complained of. This, as well as the instruction given as to the number of jurors necessary to find a verdict, was also excepted to by defendant. At the instance of the defendant the court gave six instructions, the first (No. 2) defining ordinary care, the second (No. 3) told the jury that the plaintiff, by entering and continuing in the employ of the defendant, assumed the risk of any injury that might result from the employment on account of any dangers arising from the conduct of the business and the condition of the premises, as such business would be conducted and such premises maintained in the ordinary and usual way by reasonably prudent men engaged in like business, and if the jury find that the condition of the premises was such as usually and customarily exist in similar places as conducted by reasonably prudent men engaged in such business, defendant is not liable. Instruction number 4 told the jury that if they believed that there was any passageway in the defendant's shop on the occasion in question through which plaintiff could have passed to the point at which he attempted to go by the exercise of ordinary care with reasonable safety to himself, plaintiff is not entitled to recover. Instruction number 5 told the jury that the defendant was not obliged to do more than exercise ordinary care to keep its premises in reasonably safe condition for the use of its employees while at work and while passing to and from their work, nor was the defendant required by the law to keep or maintain any particular kind of passageway through its shop for the use of its employees, and if the jury believed and found from the evidence that defendant was exercising ordinary care to keep its shop in reasonably safe condition for the use of its employees while at work and while passing to and from their work, and that the condition of the shop was such that if plaintiff had exercised or-

dinary care for his own safety he could have passed safely from his place of work to the time clock to which he was attempting to go, then plaintiff is not entitled to recover, even though the jury further find from the evidence that there were obstructions in the particular passageway through which he attempted to pass. Instructions numbers 6 and 7 were as to the credibility of witnesses and the weight to be given to them in determining their credibility. Instruction number 7, after calling attention to the fact that in determining the credibility of the witnesses the jurors should look to and consider the manner and demeanor of the witnesses and their probable interest or bias, concludes thus: "And having thus carefully considered all these matters, the jurors must fix the weight and value of the testimony of each and every witness, and the evidence as a whole, and you are not compelled to accept as true any statement made by any witness unless the jurors find such statement to be true after considering the same in connection with all the facts and circumstances before them."

The jurors, nine of them concurring, returned a verdict in favor of the plaintiff in the sum of two thousand dollars. Afterwards, in due time, defendant filed its motion for new trial which was overruled, exceptions saved and appeal duly perfected to this court by the defendant.

The assignments of error in this court are to the refusal of the instruction in the nature of a demurrer to the evidence at the close of plaintiff's evidence and a like refusal at the close of all the evidence. Error is also assigned on the instruction given as modified by the court at the request of plaintiff, the error assigned on this instruction being that it submitted to the jury the question as to whether or not it was necessary for plaintiff to go through the finish room, when plaintiff's own evidence established the fact that he could have gone out in at least two other ways, and fur-

ther that it assumed that "over the alleged scrap pile" was a mode of egress furnished by defendant, contrary to the plaintiff's own evidence; it submitted the issue whether or not the route taken by plaintiff was or was not the only one provided by defendant, contrary to plaintiff's own admissions. The fourth and fifth errors are to the overruling of the motion for new trial and that on the record the judgment was for the wrong party.

We have set out what we consider a fair synopsis of the evidence in the case. We have set out the instructions given at the instance of plaintiff and at the instance of the defendant. It is useless to contend that the demurrers to the evidence should have been sustained. There was evidence to warrant the jury in finding for the plaintiff. Nor are the errors assigned to the instruction given at the instance of plaintiff as modified by the court tenable. The objections are founded on a rather one-sided view of plaintiff's testimony and lose sight of his testimony as a whole. We do not think the instruction tended to misdirection of the jury, nor do we think that it is subject to the criticism leveled against it by the learned counsel for defendant. The defendant surely has no cause to complain in this case of the manner in which the jury was instructed in those given at its request. If we were going into an examination of instructions on appeal of the defendant, we should be inclined to hold that they were rather too favorable and presented the defendant's case rather too strongly to the jury. But they are not before us as the plaintiff is not complaining, and we are not remanding the case.

"An employer is liable if the ways used by his servant, either in driving or walking, are encumbered." [1 Labatt, Master & Servant, p. 235, sec. 100a.] The employer's duty to his employee to furnish a safe exit and ingress to his place of work is akin to his duty to furnish a reasonably safe place to work. See Lore



v. American Mfg. Co., 160 Mo. 608, 61 S. W. 678; Irmer v. Brewing Co., 69 Mo. App. 17. See also Fitzgerald v. Conn. River Paper Co., 155 Mass. 155; McGovern v. Central Vt. R. R. Co., 123 N. Y. 280; Dorney v. O'Neill, 49 App. Div. (N. Y.) 8, s. c. 60 App. Div. 19, l. c. 21. The trial was without error to the prejudice of the defendant, the judgment is manifestly for the right party, and assuming that the extent of the injury is as testified to, the verdict is moderate in amount, so that we see no ground whatever for complaint on the part of the defendant. The judgment of the circuit court is affirmed. All concur.

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CLARENCE W. QUEATHAM et al., Respondents, v.  
MODERN WOODMEN OF AMERICA, Appel-  
lant.

St. Louis Court of Appeals, April 19, 1910.

1. **LIFE INSURANCE: Fraternal Beneficiary Association: Engaging in Forbidden Occupation by Insured.** In an action on a certificate of insurance issued by a fraternal beneficiary association, where the evidence is conclusive that at the time of his death insured was engaged in an occupation prohibited by the express terms of the contract of insurance, if it be further shown that his death was directly traceable to such employment, no liability obtains against the insurer.
2. ———: ———: ———: **Cause of Death: Burden of Proof.** A fraternal beneficiary association, seeking to defeat recovery on a certificate of insurance on the ground the member died while engaged in a prohibited occupation, has the burden of showing the member came to his death as a direct result thereof.
3. ———: ———: ———: **Evidence: Proofs of Death: Admissions.** Proofs of death furnished by a beneficiary in a life policy to insurer, in accordance with the policy, are admissible in evidence against the beneficiary as admissions of the truth of the statements therein contained, but the admissions are only prima facie true, and may be explained on the trial.

4. **GUARDIAN AND WARD: Evidence: Admissions by Guardian.** Generally, a guardian may not make an admission contrary to the interest of his ward, and, as against an infant, everything must be proved.
5. **LIFE INSURANCE: Fraternal Beneficiary Association: Guardian and Ward: Evidence: Admission by Guardian: Proofs of Death.** A guardian furnishing proofs of death of one injured in a life policy, payable to his infant wards, may not bind the wards by admissions beyond the actual requirements of the policy, and where the cause of death need not be stated in the proofs, and a transcript of the coroner's inquest need not be furnished therewith, the act of the guardian in stating the cause of death in the proofs of death, and in furnishing therewith a transcript of the coroner's inquest, is not binding on the infant beneficiaries.
6. ———: ———: **Proofs of Death: Requirements: Stating Cause of Death.** A mutual benefit certificate, stipulating that no action may be maintained thereon until proofs of death and of claimant's rights to benefits have been filed and passed on by the officers of the association, does not impose the duty to recite in the proofs of death the cause of death.
7. **EVIDENCE: Hearsay: Depositions Taken Before Coroner.** Depositions of witnesses before a coroner are not admissible in evidence in litigation subsequently arising, touching the subject-matter of the coroner's inquest, unless expressly authorized by statute.
8. ———: ———: ———: **Admissible to Impeach.** Depositions of witnesses before the coroner may be used for the purpose of contradicting witnesses giving testimony in subsequent litigation touching the same subject-matter.
9. ———: ———: **Statute.** Section 6642, Revised Statutes 1899, providing that the evidence of witnesses before the coroner shall be preserved in writing and shall in a specified case be returned to the court of the county having criminal jurisdiction, does not make depositions of witnesses before the coroner admissible in evidence to establish the cause of death in any case.
10. **CORONERS: Inquest not Court of Record.** Under the common law in England, a coroner's inquest was a court of record, but it is not so regarded in this country.
11. **EVIDENCE: Judicial Records: Conclusiveness.** Records of courts of competent jurisdiction are conclusive between the parties and privies, and, as a general rule, they import absolute verity.

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12. **CORONERS: Determining Whether Inquest Should be Held.** The exercise of discretion by a coroner with respect to determining whether or not an inquest should be held is an act of judicial character; but aside from this, there is nothing in the statutes according the force and effect of a judicial proceeding to an inquest.
13. **EVIDENCE: Coroner's Inquest: Admissibility of Verdict.** No provision of our statute authorizes the reception of a coroner's verdict in evidence in civil litigation arising out of the subject-matter of the inquiry, for the purpose of proving the cause of death.
14. **LIFE INSURANCE: Fraternal Beneficiary Association: Evidence: Coroner's Inquest: Admissibility of Verdict.** In an action on a mutual benefit certificate, the coroner's verdict is competent evidence as part of the proof of the death of insured, but it is not *prima facie* competent as tending to prove the cause of such death, and this is true no matter by which party it is introduced.
15. ———: ———: **Engaging in Forbidden Occupation by Insured: Cause of Death: Sufficiency of Evidence.** In an action on a mutual benefit certificate, stipulating that there shall be no recovery if the death of the member occurred as a direct result of following a prohibited occupation, evidence *held* not to show that the member came to his death as a direct result of engaging in a prohibited occupation.

Appeal from St. Louis County Circuit Court.—*Hon. John W. McElhinney*, Judge.

**AFFIRMED.**

*Benj. D. Smith* and *R. M. Tunnell* for appellant.

(1) Proofs of death furnished to the society are *prima-facie* evidence of the facts therein stated and are conclusive unless the beneficiaries show that the statements made therein were erroneous or were given through mistake. *Almond v. Modern Woodmen of America*, 113 S. W. 695; *Insurance Co. v. Newton*, 22 Wall. 32; *Hassencamp v. Ins. Co.*, 120 Fed. 475; *Hanna v. Ins. Co.*, 44 N. E. 1099; *Walther v. Insurance Co.*, 4 Pac. 413; *Modern Woodmen of America v. Von Wald*, 49 Pac. 782; *Hart v. Trustees, etc.*, 84 N. W. 851;

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3 Elliott on Evidence, sec. 2387; 2 Wigmore on Evidence, p. 1265. (2) Where, as in this case, the unexplained admissions in the death proofs, and the uncontradicted evidence shows the fact that Queatham was engaged in a hazardous occupation and that his death was directly traceable thereto, it was the duty of the trial court to direct a verdict for the defendant and the court erred in not so directing the jury, and the appellate court will, on appeal, reverse the judgment. Riechenbach v. Ellerbe, 115 Mo. 588, and cases therein cited. Lavin v. Grand Lodge, 104 Mo. App. 1; Carroll v. Transit Co., 107 Mo. 653. (3) Where a verdict can be accounted for only on the ground of ignorance, partiality, prejudice, or passion, it will not be permitted to stand. Lang v. Moon, 107 Mo. 334; Caruth v. Richerson, 96 Mo. 180; Avery v. Fitzgerald, 94 Mo. 207; Garrett v. Greenwell, 92 Mo. 120; Spohn v. Railroad, 87 Mo. 74; Whitsett v. Ransom, 79 Mo. 258. (4) In order to establish that Queatham's death was due to an accident traceable to his occupation the defendant is not required to negative mere conjecture or even plausible possibilities. A verdict based upon conjecture or mere possibility cannot be permitted to stand. Sovereign Camp v. Haller, 24 Ind. App. 108; Sovereign Camp v. Hraby, 96 N. W. 998; Agen v. Metropolitan, etc., Co., 80 N. W. 1020; Leisenberg v. State, 84 N. W. 6; Supreme Lodge v. Fletcher, 29 Southern 523; Zearfoss v. Switchmen's Union, 112 N. W. 1044; Hardinger v. Modern Brotherhood, 103 N. W. 74. (5) If but one natural and rational inference can be drawn from the undisputed facts, it is the duty of the court to treat the matter in question as one of law and direct the proper verdict. Hardinger v. Modern Brotherhood, 103 N. W. 74; Somerville v. Knights Templar, 11 App. D. C. 417; White v. Ins. Co., 105 N. Y. S. 87; Sovereign Camp v. Hraby, 96 N. W. 998; Clemens v. Royal Neighbors, 103 N. W. 402; Pagett v. Connecticut, etc., Co., 66 N. Y. S. 804; Seybold

v. Supreme Tent, 83 N. Y. S. 149; John v. Northwestern, etc., Assn., 63 N. W. 276.

*John E. Turner* for respondents.

(1) Records of coroner's inquest are not evidence of the truth of the facts therein stated but only that said record was made. *Carney v. Carney*, 95 Mo. 353; *Ins. Co. v. Kielgast*, 6 L. R. A. 65. (2) Deceased was not working for a railroad company but was employed by the Hydraulic Press Brick Company and the terms of defendant's by-laws clearly contemplate and evidently were for the purpose of covering employees of railroad company in the hazardous occupations mentioned, and was so understood by deceased as well as defendant, and hence do not apply to this case. *James v. Casualty Co.*, 113 Mo. App. 622; *Foglesong v. Modern Brotherhood of America*, 121 Mo. App. 548; *Batten v. Modern Woodmen of America*, 131 Mo. App. 381. (3) The burden of proof is on defendant to show that insured's death was directly traceable to hazardous occupations. It is not enough to show that he was engaged in such occupation or even to show that his death was indirectly traceable thereto, but must show to the satisfaction of the jury that it was directly traceable to such hazardous occupation. *Meadows v. Ins. Co.*, 129 Mo. 76; *Fetter v. Fidelity and Casualty Co.*, 174 Mo. 256; *Hodsdon v. Ins. Co.*, 97 Mass. 144; *Campbell v. Insurance Co.*, 98 Mass. 381; *Redman v. Ins. Co.*, 49 Wis. 431; *Ins. Co. v. Brawn*, 57 Miss. 308; *Ins. Co. v. Ewing*, 92 U. S. 377; 4 Briefs on the Law of Insurance, pp. 3257 (m), 3258. (4) The by-laws of defendant should be construed so as to give and not forfeit or destroy insurance. *James v. Casualty Co.*, 113 Mo. App. 622, *supra*; *Fogelsong v. Modern Brotherhood of America*, *supra*; *Lewine v. Supreme Lodge K. of P.*, 122 Mo. App. 547; *Edmonds v. Modern Woodmen of America*, 125 Mo. App. 214; *Leech v. The Order of B. R. T.*, 130 Mo. App.

5; *Rodgers v. Modern Brotherhood of America*, 131 Mo. App. 353; *Batten v. Modern Woodmen of America*, supra; *Knights Templars & M. L. I. Co. v. Jarman*, 104 Fed. 638; *Parish v. N. Y. P. Exchange*, 169 N. Y. 34; *Weber v. Supreme Tent of Maccabees*, 172 N. Y. 490; *Hall v. The Spring F. & M. Ins. Co.*, 46 Mo. App. 508; *Renn v. Supreme Lodge K. of P.*, 83 Mo. App. 442; *Fogelsong v. Modern Brotherhood of America*, supra; *Lewine v. Supreme Lodge K. of P.*, supra; *Siebert v. Supreme Council O. C. F.*, 23 Mo. App. 268; *Connelly v. The Shamrock B. S.*, 43 Mo. App. 283. (5) Proofs of death, even though furnished by adult beneficiary not conclusive where there is any evidence, however slight, to the contrary, and to treat them in the most favorable manner is only to submit the same to the jury along with other evidence. *Almond v. Modern Woodmen of America*, 133 Mo. App. 382; 3 *Elliott on Evidence*, p. 873, sec. 2390; *Ins. Co. v. Kielgast*, 6 L. R. A. 65, supra; 4 *Briefs on the Law of Insurance*, p. 3259 (n); 4 *Briefs on the Law of Insurance*, p. 3471. (6) Neither the plaintiffs nor their guardian made any voluntary admissions but were forced by defendant to furnish the certified copy of the coroner's proceeding at the inquest of deceased, as a part of the proofs of death. Defendant's By-laws A. D. 1905, secs. 62-64; fifth instruction, page 59, defendant's abstract of record. (7) Admissions made by the guardian of infant wards in furnishing proofs of death, as in this case, such guardian being a nominal party only, are not binding on his wards, they being the real parties in interest. *Melcher, Admr., v. Derkum Admr.*, 44 Mo. App. 650; *Eitelgeorge v. The Mut. H. B. Assn.*, 69 Mo. 52; *Knights Templars & Masons L. I. Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066; *Cochran v. McDowell*, 15 Ill. 10; *McClay v. Norris*, 9 Ill. 370; *Reaves v. Fillden*, 18 Ill. 77; *Quigley v. Robers*, 44 Ill. 504; *Shlatterer v. Brooklyn & N. Y. F. Co.*, 75 (App. Div.) N. Y. 330; *Buffalo L. T. & S. D. Co. v. Knights Templar & M. M. A. Assn.*, 126 N. Y. 450, 27

N. E. 942, 22 Am. St. Rep. 839; Casper v. Mayhew, 40 Mich. 528; Wood v. Truax, 39 Mich. 628; Claxton v. Claxton, 56 Mich. 557; Crainy v. Parker, 1 Ind. 374; Hiatt v. Brooks, 2 Ind. 508; Matthews v. Dowling, 54 Ala. 202; Daingerfield v. Smith, 83 Va. 81; Bank v. Patton, 1 (Rob) Va. 499; Waterman v. Lawrence, 19 Cal. 210; Kidwell v. Ketler, 146 Cal. 12; Hayden v. Collins (Cal. App.), 81 P. 1120; Stinson v. Pickering, 70 Me. 273; Ins. Co. v. Stebbe, 46 Md. 302; Fidelity Mut. L. Assn. v. Ficklin, 74 Md. 173; Ins. Co. v. Nicklas, 88 Md. 470; Benson v. Wright, 4 Md. Ch. 278; Eaton v. Fillinghast, 4 R. I. 276; Isert v. Davis, 17 Ky. L. Rep. 686; Bank v. Richie, 33 U. S. 8 Pet. 128; Buck v. Maddock, 47 N. E. 208; McIlvoy v. Alsop, 45 Miss. 374; Aikn v. Gatlin, 48 La. Ann. 877; Finn v. Hemstead, 24 Ark. 111; Pillow v. Sentelle, 39 Ark. 61; Moore v. Woodall, 40 Ark. 42; Pinchbock v. Graves, 42 Ark. 222; Driver v. Evans, 47 Ark. 295; 1 Elliott on Evidence, secs. 242, 244, 245, 246; Briefs on the Law of Ins. (Cooley), pp. 3468, 3469, 3470, 3471. (8) Certificate of membership prima-facie evidence of good standing. Mulroy v. Supreme Lodge K. of H., 28 Mo. App. 463; Forse v. Supreme Lodge K. of H., 41 Mo. App. 106. (9) Trial court did not err in refusing to direct the jury to return a verdict for defendant. Steube v. Christopher & Simpson, I. & T. Co., 85 Mo. App. 640; Ladd v. Williams, 104 Mo. App. 390.

**NORTONI, J.**—This is a suit on a certificate of life insurance. The plaintiff recovered and defendant prosecutes the appeal. The question for decision relates entirely to the sufficiency of the proof to sustain the verdict for plaintiffs. In other words, it is urged the court should have directed a verdict for defendant on its affirmative defense that deceased came to his death as a direct result of his employment in an occupation prohibited by the contract of insurance. As the principal elements relied upon by defendant in support of its ar-

gument consist of admissions in the proof of death and the record of the coroner's inquest introduced by it, the competency and probative force to be accorded to these documents are subjects for consideration as will hereafter more fully appear.

The defendant is a mutual benefit association organized under the laws of the State of Illinois and doing a life insurance business in Missouri. The plaintiff sues as the duly appointed and qualified guardian of several minors who are the beneficiaries in the certificate of insurance involved. It appears that several years ago the deceased, David Queatham, father of the beneficiaries, became a member of the defendant order and for a competent consideration it issued to him its certificate of insurance on his life to an amount not exceeding two thousand dollars which, after the decease of his wife, became payable to his children, the infant beneficiaries, for whom the guardian prosecutes this suit. The insured, David Queatham, died December 26, 1906, but just what occasioned his death was the question at issue in the trial, for, if it occurred as a direct result of his following the occupation of railroad brakeman or switchman, which was prohibited by the contract of insurance, no liability may be enforced against the defendant.

At the trial, besides introducing the certificate of insurance and proving the right of the guardian to maintain the suit for the infant beneficiaries, plaintiff introduced a stipulation, executed by the defendant to the effect that at the time of his death the insured was in good standing in the order and had paid all of his assessments and dues thereto. The defendant, by its answer, admitted as well that plaintiff had departed this life on the date mentioned and due proof of his death had been furnished it in accordance with the stipulation of the contract.

A prima facie case having been thus made, the defendant sought to escape liability on the grounds the



insured came to his death as a direct result of following the occupation of a railroad brakeman or switchman, which occupation was prohibited by the contract. The certificate of insurance stipulated that if the insured should follow any employment or occupation mentioned in section 14 of the by-laws of the society the contract of insurance should thereby become *ipso facto* null and void as to any claim for death benefits, if the death of the insured was directly traceable to such hazardous employment or occupation. Section 14 of the by-laws, in force at the time the certificate was issued and at all times thereafter, including the date of the death of the insured, denounced and prohibited the occupation of railroad brakeman on all trains except passenger trains using air-brakes only and further denounced and prohibited the occupation of a railroad switchman, such as switching or coupling cars or braking thereon. And it was further stipulated in the contract that a person should be held to be engaged in such prohibited occupations when the work or duties incident to his employment required him occasionally or continuously during any part of the year to perform any of the work or duties of or incident to such prohibited occupations. The insured was in the employ of the Hydraulic Press Brick Company at the time of his death and the duties of his employment required him to work both as a railroad brakeman and switchman about a locomotive engine and numerous cars on the tracks at the works of the press brick company. It is true he was not employed by the railroad company, nevertheless he, together with his companions, worked daily about a standard locomotive engine and railroad cars operated by the press brick company at its works. The duties of the insured were to throw switches, give signals, couple cars, set brakes, ride on the freight cars and locomotive engine as on any railroad. It appears, too, the train about which he worked was not a passenger train and the cars were not cars using air-brakes. Indeed, the evidence is conclusive to

the effect that at the time of his death the insured was engaged in an occupation prohibited by the express terms of the contract of insurance and if his death was directly traceable to such employment, then no liability therefor obtains against the defendant, for the reason such liability is expressly excluded by the provisions of the contract.

After setting forth the provision of the certificate and its by-laws touching such prohibited employment, the defendant affirmatively pleaded the insured came to his death by being crushed between the cab and the tender of a locomotive engine about which he was employed and prayed to be discharged from liability on the ground his death was directly traceable to such prohibited employment. There can be no doubt that the burden is on the defendant to show to the reasonable satisfaction of the jury the insured came to his death as a direct result of the prohibited occupation in which he was engaged. [Meadows v. Pac. Mut. Life Ins. Co., 129 Mo. 76, 31 S. W. 578; 3 Elliott on Evidence, sec. 2372; 4 Cooley's Briefs on Insurance, p. 3257.]

To sustain this burden, the defendant introduced in evidence, over the objection and exception of plaintiff, the proofs of death furnished it by the plaintiff, together with a copy of the coroner's inquest or verdict and the depositions of witnesses given at such inquest. The evidence was received on the theory that it constituted admissions by plaintiffs against interest.

In connection with, and as parcel of, the proofs of death, there is a certificate of the attending physician to the effect that insured came to his death from a fracture at the base of the skull and the several depositions of witnesses at the inquest together with the verdict of the coroner's jury recite deceased came to his death from injuries received by being crushed between the tender and cab of a locomotive engine while rounding a short curve.

After the court received these documents in evidence, over the objection and exception of plaintiff, plaintiff introduced other evidence in rebuttal, tending to contradict the same and indicating the insured might have come to his death as a result of a stroke of apoplexy. This evidence will be further noticed hereafter. The defendant argues that the evidence introduced by plaintiff in rebuttal is wholly insufficient to overcome and repel the probative force of the facts recited pertaining to the cause of death in the proof of death and the depositions and coroner's verdict; that the proof of death and proceedings before the coroner are to be regarded as admissions against the beneficiary and sufficient to support its defense unless overcome by substantial evidence to the contrary.

This matter will be considered in three parts: First, as to the competency of the proof of death as admissions against interest; second, as to the depositions given before the coroner; and third, as to the probative force of the coroner's inquest, or, in other words, the verdict of the coroner's jury.

It may be stated as a general rule that proofs of death furnished by a beneficiary to the insurer in accordance with the stipulations of the policy are admissible in evidence against such beneficiary as admissions by him of the truth of the statements therein contained. Although there is strong reason for the rule where the statement is made directly by the beneficiary, it is subject to the qualification that the beneficiary will not be estopped by erroneous statements in the notice of proofs of death under all circumstances. In other words, succinctly stated, in proper cases, admissions contained in such proofs may be explained on the trial. They are only prima facie that the facts stated are true. [Ins. Co. v. Newton, 12 Wallace 32, 89 U. S. 32; 4 Cooley's Insurance Briefs, pp. 3467, 3471, 3472; 3 Elliott on Evidence, sec. 2387.] But the rule as to such admissions does not obtain in this case for the reason the

plaintiff here acted in the capacity of guardian for his wards in furnishing the proof of death. Generally speaking, the guardian can make no admission contrary to the interest of the ward. As against an infant, everything must be proved and he is not bound by admissions made by the guardian. [Cochran v. McDowell, 15 Ill. 10; Kidwell v. Ketler, 146 Cal. 12; Claxton v. Claxton, 56 Mich. 557; Quigley v. Roberts, 44 Ill. 503; Schlotterer v. Brooklyn, etc., Ferry Co., 75 App. Div. Rep. N. Y. 330; Cooper v. Mayhew, 40 Mich. 528; 15 Am. and Eng. Ency. Law (2 Ed.), 71, 72.] It may be that this doctrine obtains with full force and effect as to all statements of fact in proofs of death under life insurance policies made by guardians to the end of collecting the insurance for his ward. But on this we give no opinion. This question is expressly reserved for the reason it is unnecessary to a proper disposition of the case. It is sufficient to say here that the general doctrine precluding admissions by a guardian as against the interest of his ward obtains, at least in insurance cases, to the extent that such guardian may not bind the ward by making admissions beyond the actual requirements of the policy. Where the contract between the parties expressly requires certain facts to be disclosed in the proofs of death as a condition precedent to collecting the insurance, it may be that the statement of facts to that end made by the guardian are competent to be received as admissions against the interest of the ward, but on principle the rule certainly can extend no farther than this. As a general proposition, an agent may bind his principal within the scope of his authority, but the rule as to guardians is more strict than that which obtains ordinarily between principal and agent. And it is entirely clear that a guardian will not be permitted to bind his ward by statements in the proof of death which are not required to be made as conditions precedent. [Buffalo Loan & Trust, etc., Co. v. Knight Templar Assn., 126 N. Y. 450, 27 N. E. 942; Knights Tem-

plar, etc., Co. v. Crayton (Ill.), 70 N. E. 1066; 4 Cooley's Insurance Briefs, pp. 3468, 3469.]

The admission relied upon as being in the proof of death is the statement of the attending physician that the insured came to his death from a fracture at the base of the skull together with statements contained in the depositions given before the coroner and the verdict indicating that his death resulted from being caught between the cab and tender of a locomotive engine. It is certain that none of these statements can be accepted as admissions against the interest of the infant wards for the reason, if none other, that the guardian was not required by the contract of insurance to make any such showing of fact. It is argued by defendant in the brief as though its by-laws required these matters to be set forth in the proof of death. As to this we are unadvised. It is sufficient to say that no such by-laws appear in the record before us. All that appears in the record touching the requirements as to proof of death is a recital in the certificate to the effect that no action may be maintained thereon until proofs of death and claimant's right to benefits have been filed with the company and passed upon by the board of directors. From this no requirement appears by which the duty is imposed upon any one to recite the cause of death in such proofs. This being true, any statement made by the guardian in such proofs, or otherwise, with respect to that matter, was voluntary and that such voluntary statements may not be attributed to the ward as admissions against interest is beyond question. See Buffalo Loan Trust, etc., Co. v. Knights Templar, etc., 126 N. Y. 450, directly in point.

Although there appears indorsed on the back of the blank form for proof of death, which was furnished by defendant, a request to accompany the proof with a copy of the proceedings had before the coroner, there is not a word contained in the certificate or by-laws

before us imposing such a duty upon the parties in interest. Indeed, nothing appears in the record, certificate or by-laws, or in any portion of the contract, indicating that the cause of death should be stated in the proofs or that the coroner's proceedings should be furnished therewith. In these circumstances, it is clear that if the guardian furnished a copy of the coroner's evidence and verdict at the instance of the defendant, he did so as an accommodation to it and not in performance of an act enjoined by the policy upon his wards. The court should have rejected the proof of death, the depositions of witnesses and the verdict of the coroner's jury attached for the reason stated, if for none other. Those documents were wholly incompetent as admissions against the infant beneficiaries.

But it is said even though the proof of death be rejected, the coroner's verdict and depositions given at the inquest are to be considered, independent of such proofs. We are not so persuaded. As to the depositions given by the witnesses at the coroner's inquest, it ought to be sufficient to say that every principle of natural justice points these should be excluded. *Ex parte* statements thus given without an opportunity being accorded an interested party to examine the witnesses fall within the rule against hearsay evidence, as we have always understood it. Indeed, it has been decided many times that depositions of witnesses before the coroner are not competent to be received in evidence even *prima facie* in litigation subsequently arising touching the subject-matter of the coroner's inquiry unless expressly authorized by statute. It is to be noted, however, that such depositions may be used for the purpose of contradicting a witness before the coroner who gives testimony in subsequent litigation touching the same subject-matter. [Pittsburg, etc., Ry. Co. v. McGrath, 115 Ill. 172; Ins. Co. v. Schmidt, 40 Oh. St. 112; Knights Templar, etc., Co. v. Crayton (Ill.), 70 N. E. 1066.]

The only statute we have touching the matter of the preservation of the evidence taken before the coroner is section 6642, Revised Statutes 1899, Ann. St., sec. 6642, 1906. That section provides the evidence of the witnesses shall be preserved in writing and if it relates to the trial of any person being concerned in the death, it shall be returned to the court of the county having criminal jurisdiction along with the recognizance of witnesses to be taken. Nothing whatever in this statute indicates such depositions may be received in evidence for the purpose of establishing the cause of a death in any case.

The matter relating to the finding of the inquisition itself, that is, the verdict, is not so clear. It seems that under the common law in England the coroner's inquest was a court of record but it is not so regarded in this country. [5 Ency. Pl. and Pr., p. 38.] Although the coroner with us is a constitutional officer (sec. 10 and 11, Art. IX, Constitution of Missouri), nothing to be found in the Constitution indicates that an inquest held by him shall be regarded as a court of record. Indeed, our Constitution vests the judicial power of the state in the several tribunals enumerated in sections 1, 34, 35, 36 and 37 of article VI of the Constitution and among these the coroner is not mentioned. Judicial records, that is records of courts of competent jurisdiction, are conclusive between the parties and privies and as a general rule impart absolute verity (24 Am. and Eng. Ency. Law [2 Ed.], 193), but certainly such is not true of the record of the coroner's inquest, for, as to this, none are parties or privies, although the public may not be regarded as an entire stranger to such proceedings. [1 Greenleaf, Evidence (16 Ed.), sec. 556.] There can be no doubt that in so far as the coroner exercises his discretion with respect to determining whether or not an inquest should be held his acts necessarily are of a judicial character. So much and no more has been decided on this question

by our Supreme Court. [Boisliniere v. Board of Commissioners, 32 Mo. 375.] See also 7 Am. and Eng. Ency. Law (2 Ed.), 602. But aside from this, we have been unable to discover anything in our statutes according the force and effect of a judicial proceeding to such inquest. It is true sections 6642, 6643, R. S. 1899, Ann. St., secs. 6642, 6643, 1906, require a coroner's verdict to be in writing and to be signed by the jurors and the coroner as well. These sections do not say the verdict shall be used as evidence of any particular fact. The general rule in criminal matters is said to be that when the coroner's inquisition may be received as proof of the *corpus delicti* it is not to be considered to fix a crime upon the accused. [7 Am. and Eng. Ency. Law (2 Ed.), 612.] It is clear that no provision of our statute authorizes the reception of the coroner's verdict in evidence in civil litigation arising out of the subject-matter of the inquiry, for the purpose of proving the cause of death. There appears to be considerable conflict in the decisions on the question whether a coroner's inquisition or verdict is competent prima facie evidence to show the cause of the death of the insured. It appears that some of the cases accord high importance to such inquisitions in accordance with the common law doctrine which obtained in England, to the effect that they are proceedings of courts of record, while others are influenced to some extent by local statutes different from our own. U. S. Life Ins. Co. v. Kielgast (Ill.), 6 L. R. A. 65; Pyle v. Pyle (Ill.), 41 N. E. 999; Supreme Lodge v. Fletcher, 78 Miss. 377, are leading cases in support of the doctrine referred to. See also 4 Cooley's Insurance Briefs, pp. 3259, 3260. However, those courts admit the verdict as prima facie evidence only. Other courts of high authority have expressed grave doubt on the question as to whether or not the verdict should be considered even prima facie with respect to the cause of death. See Olwell v. Milwaukee Street Ry. Co., 92 Wis. 330; Metzradt v. Modern Brotherhood, 112 Ia. 522,



527. The better opinion on this question, especially when viewed in the light of our statutes, which accord no special prerogatives to such inquests or verdicts, seems to be that declared to be the correct rule by Judge Elliott in his valuable work on Evidence, volume 3, section 2390. In speaking of this matter, Judge Elliott says the correct rule undoubtedly is that such verdict is only admissible as a part of the proofs of death and is not to be considered as evidence by the jury in determining the question of the cause of the death of the insured. Such is the view expressed by many courts and it seems in conformity with sound principle, for in subsequent litigation over the subject-matter of the inquest, parties ought not to be embarrassed even *prima facie* by findings of fact against their interest in a proceeding to which they were not parties and over which they had no control. We believe, therefore, while such verdict is competent to be received in evidence as a part of the proof that the death of the insured occurred, it is not even *prima facie* competent as tending to prove the cause of such death and this is true when it is introduced by either party. This view is supported by the following cases in point: *Cox v. Royal Tribe of Joseph* (Ore.), 71 Pac. 73; *Louis v. Connecticut Mut. Ins. Co.*, 58 App. Div. (N. Y.) 137; *Dougherty v. Pac. Mut. Life Ins. Co.*, 154 Pa. 385; *Goldschmidt v. Mut. Life Ins. Co.*, 102 N. Y. 486; *Germania Life Ins. Co. v. Ross-Lewin* (Colo.), 51 Pac. 488; *Aetna Life Ins. Co. v. Kaiser* (Ky.), 74 S. W. 203; *Union Central Life Ins. Co. v. Hollowell*, 14 Ind. 611; 3 Elliott on Evidence, sec. 2390; 4 Cooley's Insurance Briefs, 3260. See also in point, so far as the principle is concerned, *Buffalo Loan Trust, etc., Co. v. Knights Templar, etc., Assn.*, 126 N. Y. 450.

Accepting such to be sound doctrine on the subject, it therefore appears that even the coroner's verdict, although in evidence, is not to be considered as to

the cause of the death of the insured. After excluding these matters which are found to be incompetent on the question of how the deceased came to his death, the other evidence in the record, tending to sustain the defense that insured came to his death as a direct result of his employment, is very meager, indeed. In this connection it is to be remembered that plaintiff's prima facie case is abundantly made by the proof and the burden is on the defendant to overcome it by showing the insured came to his death from a cause directly traceable to his occupation as a railroad brakeman or switchman. There can be no doubt that with these documents in the case, as admissions, and other proof, the evidence would seem to greatly preponderate in favor of the defense although not entirely conclusive on that score.

Aside from these documents, it appears that deceased was riding in a locomotive engine and the proof shows he was about the gangway between the cab of the locomotive and the tender. No one saw him standing there but he was seen to be in the act of falling as though he had occupied that position, but just what caused him to fall does not appear. Some of the witnesses say the insured was conscious immediately after he fell and others say he was unconscious at that time. The evidence is both ways as to this. It appears that he died about one and one-half hours after having fallen to the ground. All of the witnesses say that there were no indications on his body of external violence; that is to say, nothing to be found on the body indicated that he had been squeezed between the cab and the tender of the engine. The only marks were a few scratches on the face resulting from his fall upon the cinders adjacent to the track. The attending physician, whose certificate appears in the proof of death, to the effect that insured's skull was fractured, testified on the trial that he had overstated the fact in the proof of death as he actually found no fracture of the skull.

It seems the physician was misled by the circumstance that insured fell from the engine and assumed that his skull was fractured because it was clear to him that he was suffering from a hemorrhage of the brain. He gave testimony to the effect that he knew the insured died as a result of a hemorrhage of the brain and that this hemorrhage might result from natural causes or what is commonly known as a stroke of apoplexy, or it might result from a fracture of the skull; that the respiration of the insured and the pupils of his eyes indicated clearly that he was suffering from hemorrhage of the brain. The physician did not express the opinion that insured died from apoplexy neither did he express the opinion that the hemorrhage was occasioned by a fracture of the skull. The testimony might afford an inference either way on the subject. It is sufficient to say here, however, on the case made, the plaintiff was entitled to recover unless the defendant showed by competent evidence that insured's death was directly traceable to his occupation of railroad switchman or brakeman. And this burden it has failed to sustain beyond a reasonable inference to the contrary. In other words, after excluding as incompetent the proof of death, the depositions given before the coroner and the verdict of the coroner's jury, the evidence tending to prove that the insured came to his death from a casualty connected with his employment is in no sense conclusive as it must be to justify us in disturbing the verdict.

In this view, the judgment should be affirmed. It is so ordered. All concur.

STATE OF MISSOURI, Respondent, v. FRED  
WALTERS et al., Appellants.

St. Louis Court of Appeals, April 19, 1910.

1. **BILL OF EXCEPTIONS: Extension of Time for Filing: Ineffective, When.** An extension of time for filing a bill of exceptions granted after the expiration of the period first fixed is ineffective.
2. **APPELLATE PRACTICE: No Exception to Overruling of Motion for New Trial.** Where no exception is saved to the overruling of a motion for a new trial, nothing is left for review, on appeal, except the record proper.

Appeal from St. Louis County Circuit Court.—*Hon.*  
*Robt. G. Ryors*, Judge.

**AFFIRMED.**

*J. C. McAtee* and *Guy A. Thompson* for appellants.

*E. W. Mills*, *S. P. McChesney* and *T. M. Pierce* for respondent.

GOODE, J.—This is the second hearing of the appeal in the present case. The defendants were convicted of assault and battery and were fined fifty dollars each. At the first hearing our attention was not called to the fact that there was no bill of exceptions in the case. When the appeal was allowed, the court, in term time, granted sixty days from August 28, 1907, to file a bill of exceptions. Afterwards, and on October 28th, the time was extended, but at the date of the extension the period first fixed had expired and hence the extension was ineffective. [Powell v. Sherwood, 162 Mo. 605.] Besides that defect, which prevents an examination of the errors assigned, we observe no exception was saved to the overruling of the motion for new trial. This omission would leave nothing for review except the record proper, wherein no error occurs.

Judgment affirmed. All concur.

CATHERINE JONES RODGERS, Appellant, v.  
EDWIN SCHIELE et al., Respondents.

St. Louis Court of Appeals, April 19, 1910.

1. **MASTER AND SERVANT: Injury to Servant: Fellow-Servant.** Where a foreman regularly assisted in cleaning brass plates, and it was part of his duties to do so, his act in letting a brass plate fall, whereby an employee who was assisting him in the work was injured, was the act of a fellow-servant for which the master was not liable.
2. ———: ———: ———: **Evidence Held Insufficient to Show Act was in Performance of Duties as Foreman.** In an action for injuries to an employee, caused by the act of a foreman in letting a brass plate fall, evidence *held* insufficient to show that at the moment he let the plate fall he was exercising the duties of a foreman in directing employees some distance away.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm, Judge.*

**AFFIRMED.**

*John J. O'Connor* for appellant.

(1) The dual capacity doctrine, as applied in this State, means this: When a servant and his master's vice-principal undertakes to do some work or act, in the master's service, that belongs to the duty of the servant, as to the doing thereof, the servant and vice-principal are fellow-servants, and if while doing such work or act the servant is injured through the negligence of the vice-principal, the master will not be liable to the servant for such injury. Provided, that the work is being done in a reasonably safe manner, and the servant has not been exposed by the vice-principal to unnecessary danger. And that the vice-principal has not by the negligent act which caused the injury rendered the servant's place of work more dan-

gerous than it would have been had his negligent act not intervened. *Bien v. Transit Co.*, 108 Mo. App. 399; *Shore v. Bridge Co.*, 111 Mo. App. 278; *Donnelly v. Mining Co.*, 103 Mo. App. 351; *Bokamp v. Railroad*, 123 Mo. App. 282; *Houston v. Railroad*, 50 Mo. App. 300; *Hayworth v. Railroad*, 94 Mo. App. 215; *Strode v. Conkey*, 105 Mo. App. 15; *Hollweg v. Telephone Co.*, 195 Mo. 195; *Donahue v. Kansas City*, 130 Mo. 670; *Fogarty v. Transfer Co.*, 180 Mo. 490; *Foster v. Reynolds*, 115 Mo. 165; *Dayharsh v. Railroad*, 103 Mo. 575; *Miller v. Railroad*, 109 Mo. 357; *Bane v. Irwin*, 172 Mo. 306; *Russ v. Railroad*, 112 Mo. 538. (2) Where the evidence leaves a doubt as to whether the foreman's negligence, which caused the injury, occurred while he was discharging a duty incident to his office of vice-principal, or while in the performance of a manual act incident to the duty of a servant, the cases should go to the jury under proper instructions. *Fogarty v. Transfer Co.*, 180 Mo. 490; *Bein v. Transit Co.*, 108 Mo. App. 399; *McIntyre v. Tebbetts*, S. R. vol. 120, p. 621, No. 2; *Depuy v. Railroad*, 110 Mo. App. 101. (3) The evidence clearly shows that the foreman was at the instant of dropping the plate that caused the injury, shaking it in his hand and using it as a means of conveying a command to other girls, employees, who were at the other end of the store, neglecting their duties, to proceed with their work. And as to that act he was a vice-principal, even though in putting the plates in the filter he acted as a fellow-servant. Hence, the "Dual Capacity Doctrine" does not apply to the facts of this case. See cases cited under point 2; *Burkard v. Rope Co.*, 217 Mo. 482.

*Seddon & Holland* for respondents.

The court did not err in giving a peremptory instruction at the close of plaintiff's case: (a) Because the petition does not state a cause of action. (b) Be-

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cause, under the testimony in the case, plaintiff was not entitled to recover for the reason that the alleged negligent act on the part of employee, Deichman, was the act of a fellow-servant and not that of a vice-principal. McIntyre v. Tebbetts, 120 S. W. 621; English v. Shoe Co., 122 S. W. 747; Hawk v. Lumber Co., 166 Mo. 121; Stephens v. Lumber Co., 86 S. W. 481; Garland v. Railroad, 85 Mo. 581; Gaul v. Beckstein, 173 Ill. 183; Allen v. Goodwin, 92 Tenn. 385; Reed v. Stockmeyer, 74 Fed. 186; Hussey v. Coger, 112 N. Y. 614; Klochinsky v. Lumber Co., 93 Wis. 417; Gain v. Railroad, 101 Tenn. 380; Railroad v. Mauzy, 98 Va. 629; McElligott v. Randolph, 61 Conn. 157; Railroad v. Torry, 58 Ark. 277; Holtz v. Railroad, 69 Minn. 524; Lindvall v. Woods, 41 Minn. 217; Daves v. Railroad, 98 Cal. 19; Railroad v. Charless, 162 U. S. 360.

GOODE, J.—Defendants are partners engaged in the business of bottling and selling whiskey in St. Louis. Their business involves filtering the whiskey, and the filter used by them in their works stood on a platform six feet above the floor of a room where plaintiff worked. A part of the appliance was round brass plates about eight inches in diameter and weighing ten pounds. These were washed now and then and it was part of plaintiff's duty to assist in washing them, which she did during half of every week. Another employee who took part in this task occasionally was Ann Hagge. The washing was done in this way: Kries Deickman, the foreman, would stand on the platform, hand the disks or plates to plaintiff or Ann Hagge, who would wash and hand them back to Deickman and he would place them in the filter. Plaintiff was doing the washing on June 15, 1905, with the assistance of the foreman, and in the course of her task was seriously hurt. She handed a plate up to Deickman, whose attention was attracted at the instant by some girl employees sixty feet away in the room, who were laughing, chattering and gestic-

ulating to Deickman. Their behavior caused him to hesitate a moment before placing the disk in the filter; meanwhile he held it in his hand and shook it toward the girl and it dropped from his hand and struck plaintiff on the head. This action was filed for damages against defendants, the theory of recovery being they were responsible for Deickman's carelessness because he was foreman. The girls in the room were under Deickman's orders, he gave them directions and showed them what to do. But the testimony showed he helped regularly about the work and that it was part of his task to assist in washing the disks and he did so constantly. The court below directed a verdict for defendant at the close of the evidence for plaintiff, whereupon she took a nonsuit with leave to move to set aside and that motion having been made and overruled, an appeal was taken to this court. The theory of plaintiff's counsel is that Deickman, when the plate fell from his hand, was reproving the girls at the other end of the room for their gossip and idleness, and to emphasize an order he was giving them to attend to their business, shook his hand which held the plate, thereby loosening his hold on it so it fell. On this theory it is argued he was exercising the authority of a vice-principal and representative of the defendants at the time and not acting as a fellow-servant of plaintiff. But there is no evidence he was ordering or reproving the girls. On the contrary, Ann Hagge, who is the only witness as to his behavior, testified he was holding the disk in his hand and as he leaned over to look around a cask at the girls, it dropped. She said the girls were "laughing and cutting up and motioning to him" and his hand was shaking in a way she indicated. When asked what he was doing with his hand, she answered: "He was not doing anything with it except playing with it; his hand was shaking." The only fair inference to draw from the evidence is that Deickman was engaged at the moment in a by-play between him and the girls at the end of the room, and



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had paused in his task to participate in it, letting the plate fall during some movement he was making in humorous response to their gestures. Because Deickman had a regular task as a co-employee with plaintiff and was engaged in the task at the time of the accident, we think plaintiff must be denied recovery. The law of the case is clear and it is sufficient to cite an opinion expounding it and reviewing all the apposite cases in this State. [English v. Shoe Co., 145 Mo. App. 439, 122 S. W. 747.]

The judgment is affirmed. All concur.

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**KATE L. HOWARD, Respondent, v. CITY OF NEW MADRID, Appellant.**

St. Louis Court of Appeals, April 19, 1910.

1. **MUNICIPAL CORPORATIONS: Negligence: Injury on Sidewalk: Assumption That City Had Done Duty.** A person using a city sidewalk cannot presume that the city has done its duty in keeping the sidewalk in repair, when she knows it is in bad condition.
2. ———: ———: ———: **Duty of City.** A city is not bound, at all hazards, to keep its sidewalks in safe condition for travel, but is only bound to use ordinary care to keep them in a reasonably safe condition for travel by day and night.
3. ———: ———: ———: ———: **Overstating Degree of Care: Instructions: Harmless Error.** In an action against a city for injuries received on a defective sidewalk, an instruction overstating the degree of care required of a city was harmless error, where it was conceded the sidewalk was out of repair and had been for months and that its condition was known to everybody.
4. ———: ———: ———: **Presuming City Had Done Duty: Instructions: Harmless Error.** In an action against a city for injury received on a defective sidewalk, an instruction that plaintiff might presume that the city's duty had been performed by it and that the sidewalk was in a safe condition for use, was not prejudicial error, where there was no evidence tending to show plaintiff's contributory negligence.
5. ———: ———: ———: ———: **Prejudicial Error, When.** In stating plaintiff might presume defendant had performed its duty and that the sidewalk was in a safe condition for use, when she knew it was in bad condition; the court

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would have committed prejudicial error on the issue of whether plaintiff used due care for her own safety, if there was any evidence tending to convict her of contributory negligence.

6. ———: ———: ———: **Contributory Negligence.** It is not negligence for a person to use a sidewalk which he knows to be in bad repair, unless it is so unsafe that no person of ordinary prudence would attempt to walk over it.
7. **DAMAGES: Excessive Verdict.** Plaintiff, a school teacher, sustained a contusion of the lower third of the tibia from a defective sidewalk, causing considerable pain and injuring the nerves. At the time of trial, nearly two years afterward, she was still suffering from the injury, and had been disabled from pursuing her vocation for nearly a year. *Held*, a recovery of \$2000 was not excessive.
8. ———: **Loss of Time: Evidence: Harmless Error.** In an action for personal injuries where evidence concerning the salary paid to plaintiff was received, although the petition did not allege loss of time or earnings, such evidence, whether rightly admitted or not, will not work a reversal of the judgment, where the jury were not authorized in the instruction on the measure of damages to assess damages for loss of time or earnings.

Appeal from Ste. Genevieve Circuit Court.—*Hon. Chas. A. Killian*, Judge.

**AFFIRMED.**

*W. H. & J. G. Miller* for appellant.

*J. V. Conran* for respondent.

GOODE, J.—Action by plaintiff, respondent here, against the city of New Madrid, a city of the fourth class, for damages for injuries alleged to have been received by her in passing over a defective sidewalk in that city. The amended petition upon which the case was tried, after setting out the incorporation of the city of New Madrid as a city of the fourth class, and the location of the street on which the injury is alleged to have occurred, and that the sidewalk along the street was maintained and permitted by the defendant for the

general public, and that defendant was fully aware of all the facts and statements in the petition set out, and that it was the duty of the defendant "to keep said walk in reasonably safe condition for the public and persons passing over the same," charges that the boards on which the top planks had been nailed had rotted; that the nails had come out of the planks and the walk was in such a condition that the defendant by failure to reconstruct, repair or remove, was grossly negligent or careless of the safety and welfare of the persons passing over the same and was aware of the condition of the walk and knew that the stringers or under pieces had so rotted; that the nails had come out; that the top planks were loose; or by the exercise of care and observation could have known these facts and that the plaintiff, "in orderly, carefully and properly passing over said walk," was struck by a loose board in the walk flying up and striking her upon the lower part of her leg, "causing her an injury which did cause her great pain, expense and loss of time, pain of body and anguish of mind; . . . that the defendant had not in any way, after timely notice and knowledge, taken any steps to warn the public of the condition of the said walk, that plaintiff did not know of the condition of the walk at the point where she was injured and damaged in the sum of \$20,000; that the accident was occasioned by no fault of hers; wherefore plaintiff prays judgment for \$10,000 actual and for \$10,000 exemplary damages."

The answer alleges that whatever defects there were in the sidewalk were apparent to any one passing over it and using it and that if there were any defects, plaintiff assumed all the risks incident to such use; that whatever defects existed in the sidewalk were well known to plaintiff before she passed over it on the day on which she alleges she received the injuries complained of and had assumed all risks incident to such use, and whatever injuries she received were the direct result of

her own negligence and carelessness contributing directly thereto, in this, that after receiving warning of the dangerous and unsafe condition of the sidewalk she voluntarily undertook to pass over it.

On trial before a court and jury, plaintiff introduced evidence tending to show that the condition of the sidewalk where the accident occurred was bad; that the condition was apparent to anybody, some planks were loose and some nailed down; at some places the boards were entirely gone; that the plaintiff, who was a school teacher in one of the public schools, in going from her boarding house to her school, would have to and did go over this walk. She had been boarding and teaching school there for some four or five months previous to the accident. This sidewalk was one of the most traveled portions of the thoroughfare in the city. This was the testimony of a witness for plaintiff, he repeating, under cross-examination, that the condition of the sidewalk along the place of the accident was known to everybody. One of plaintiff's witnesses testified that he did not consider that it was particularly dangerous, but its condition was apparent to anyone stepping on the boards; they would rattle; quite a number of them were displaced. There was also testimony to the effect that the city officers were in the habit of passing over this sidewalk and presumably knew its condition. Beyond this there was no proof of actual knowledge brought home to the city authorities. It was a board walk, built of cypress lumber, with three stringers from an inch and a half to two inches thick, some of them, probably, a foot wide. The boards were of different size and about five feet long; at some places the boards were entirely absent. The walk was in such condition, said one of the witnesses, that the officers charged with the maintenance of it could easily ascertain its condition; anyone passing along the street could see that it needed repairing. This witness was asked if he knew what salary the plaintiff was receiving as school teacher. This

was objected to on the ground that there was no pleading to justify any testimony of that kind. Counsel for plaintiff stated that he offered it for the purpose of showing that it ought to be considered by the jury to ascertain what the loss of time damaged her, if any. The question was permitted to be asked, counsel for defendant objecting and excepting to the ruling of the court. Witness answered that plaintiff was receiving in the neighborhood of \$45 a month as salary as a teacher. A witness for the defendant, a lady who was with her at the time of the accident, testified that she and plaintiff were walking along the sidewalk together, and she (witness) had stepped in front of the plaintiff and stepped on a loose plank and it flew up and one end of it struck plaintiff on the lower part of her left limb. The accident occurred between 6 and 6:30 on an evening in January. They were walking along at an ordinary walking gait. This lady testified that everyone who used the sidewalk knew that it was shackly and unsafe, boards were loose; planks gone; the loose planks looked like they were good but they did not have any nails in them; that was the kind of plank, said this witness, that caused the trouble; it was one that seemed to be nailed down; she had stepped on it and it flew up and struck plaintiff. Plaintiff herself testified that at the time of the accident, she was a teacher in the primary school at New Madrid; that she had to stop teaching because she was crippled; had been down town with another lady getting her mail and was returning home when she received the injury complained of. She testified that when they got to the bad walk, that is the bad places in the walk, it was dark and she took her time over that, going slowly, and was walking behind her companion, and when they got up to where the walk was all good her companion said something to her and waited until plaintiff caught up with her, when her companion started forward and stepped on the end of the board which threw it up and it struck plaintiff on the leg; struck her on the tibia of the left limb. The

effect of the blow was to produce suffering and pain and it injured the nerves a good deal. She was attended by a couple of physicians and surgeons, one of whom was a Dr. Dawson.

This accident occurred in January, 1907, and plaintiff was then engaged in teaching school. The injury prevented her teaching and she was out of her school the rest of that winter, that is the rest of the scholastic year of 1907. There is no evidence in the case as to when the scholastic year closed, but plaintiff testified that she was out of school the rest of that winter, that is, from the time of her hurt in January until she left New Madrid on the 9th of March of that year. The testimony that her salary was forty-five dollars a month as a school teacher was given over the objection and exception of defendant as not within the issues of the case. She was still suffering from the injury; is thirty-five years old and that her means of livelihood is derived from teaching school. There was no testimony in the case as to whether her pay as a teacher was stopped, or when stopped, or how much of it was withheld. On cross-examination, plaintiff testified she had lived in New Madrid about six months prior to the accident. In going from her boarding house to the schoolhouse, she passed over this piece of walk where she was injured; went over it quite a number of times but could not say frequently. The walk "was in a desperate condition," and she knew that; knew that part of it was bad, but didn't know that the balance of it where she was hurt was bad; knew that the part of the walk from what is known as Field's Hotel to the Mississippi river was bad; it was between these points that she was hurt; part of it was bad and part of it up near Dr. O'Bannon's looked like it was pretty good walk. The boards were laid across it and she did not know that any boards were loose. The boards where she was hurt were in good condition, as she thought; did not see anything about the board that was stepped on to indicate that it was bad.

Asked if it is true that it looked to be all right, whether she could say that anybody else knew that it was bad or not, she said she did not know what other people knew, but so far as this particular place is concerned where she was hurt, it appeared to be all right. In going down town she had to pass over this same walk. Asked if it was not a fact that there was not a place on the walk between Dr. O'Bannon's and Mann's store for a distance of as much as 15 feet but what had a loose plank in it, she said she could not say as to that, was not over the walk enough to be so very familiar with it, but knew it was bad. Had no physician or surgeon to examine her limb until about two weeks after the accident, although her limb hurt her right along; it hurt her so bad the night of the accident that she did not sleep. The first week it was not so sore unless something rubbed against it.

A statement of Dr. Dawson, who attended the plaintiff, was admitted in evidence, to the effect that he had been called on by the plaintiff and found her suffering from a contusion of the lower third of the tibia, which resulted in inflammation of the periosteum, from which she suffered great pain, so much that the limb had to be kept in an elevated position for at least two weeks, which injury may result in necrosis of the bone.

This was practically all the evidence for the plaintiff.

On the part of the defendant there was testimony to the effect that the defective condition of the sidewalk was apparent to everybody. This was practically all the testimony in the case. After its conclusion defendant interposed a demurrer to the evidence which was overruled and defendant duly excepted.

At the instance of the plaintiff the court gave four instructions. The first is as follows:

"1. The jury are instructed that in this case the plaintiff, Kate L. Howard, seeks to recover damages for injuries alleged to have been received by her on ac-

count of a defect in a sidewalk on Main Street in the defendant city of New Madrid, which it was the duty of the city to keep in repair. Her claim is based upon the negligence of the city in not repairing the defect, and her injury resulting therefrom. The city by its answer denies both the negligence and the injury. Under the evidence, it is for you to determine both of these questions. It was the duty of the city to keep the sidewalk in repair; the plaintiff had the right to presume that this duty had been performed and that the sidewalk was in safe condition for the use of the public."

The second instruction told the jury, in substance, that the defendant as a corporation "is bound by law to use all reasonable care, caution and supervision to keep its sidewalks in a safe condition for travel in the ordinary mode of traveling by night as well as by day; and if it fails to do so after having notice, express or implied, of any defect, it is liable for any injuries sustained in consequence of such failure, provided the party injured exercised reasonable care and caution, and the fact that the plaintiff may in some way have contributed to the injury sustained by her will not prevent her recovery, if by ordinary care she could not have avoided the consequences to herself of the defendant's negligence."

The third instruction, in substance, told the jury that if they believed from the evidence that the defendant did not exercise reasonable care, etc., over its sidewalk, "to keep it in good and safe condition, and by that means allowed it to become defective and unsafe, and if the jury further believe from the evidence that the plaintiff, in attempting to walk along that portion of the sidewalk, by reason of such defect was injured, and has sustained damages thereby as charged in the petition, and that she was, at the time, exercising reasonable care and caution in walking on said sidewalk, then the defendant is liable."



The fourth instruction told the jury that they should assess plaintiff's damages, if they found for her, "at such sum as they believe from the evidence will compensate her for the injuries sustained by her as shown by the evidence, if any, and in estimating such damages the jury will take into consideration not only the physical injury inflicted, the bodily pain and mental anguish endured and suffered, if any, and her inability by reason of said injuries to perform her ordinary avocations of life, but may also allow for such damages as it appears from the evidence as to the nature and extent of her injuries will reasonably result to her therefrom in the future, not to exceed the sum of \$10,000, the amount sued for."

The court instructed that under the evidence there could be no punitive damages awarded, and refused two instructions which the defendant asked but which its counsel now admit were properly refused.

At its own instance, the court instructed the jury that although they might believe from the evidence that defendant failed to exercise ordinary care in keeping the sidewalk in repair at the place where the injury to plaintiff is alleged to have happened, and that but for such negligence the injury would not have happened, yet the plaintiff could not recover in this suit, if she was aware of the condition of the sidewalk which occasioned the injury and failed to exercise ordinary care to avoid the accident that caused the injury. Defendant duly saved its exceptions to the giving of these instructions and at the conclusion of the case, the jury returned a verdict in favor of plaintiff in the sum of two thousand dollars. After an unsuccessful motion for new trial and in arrest of judgment and saving exceptions to the overruling of these motions, defendant has duly perfected its appeal to this court.

The foregoing full and accurate statement of the facts of this case was prepared by the Presiding Judge

of this court and will be adopted as the statement of the court. We desire only to add that it was conceded on the argument by the attorney for the city of New Madrid the sidewalk had long been in bad condition where the accident occurred, and it was further conceded in the brief for the city as follows:

"The facts in this case are substantially agreed upon. By that is meant that there was no actual dispute as to the condition of the sidewalk, and as to the knowledge of its condition by the plaintiff at, and prior to, the time that she alleges she received the injury.

"This sidewalk was on one of the main streets of the city and, it may be conceded, was generally used. It is further shown by the testimony that this lady knew of its defective condition; that it was a matter of universal knowledge, apparent to any and every one who used it. Indeed, had there been a red light or a warning signal placed at intervals of ten feet along that sidewalk, it would have served no more useful purpose as a warning to the general public and to this lady than was the universally known fact that said sidewalk was in a dilapidated condition."

The instructions for plaintiff were drawn carelessly and in some respects, inaccurately. She had no right to presume the city had done its duty in keeping the sidewalk in repair, when she knew it was in bad repair; and in saying she had the right so to presume, the first instruction was faulty. Neither is it the law that a city is bound, at all hazards, to keep its walks in safe condition for travel, but the obligation of the city is to use ordinary care to keep them in a reasonably safe condition for travel by day and night. But this imperfection in the instructions could not have had a prejudicial influence in view of the concession that the walk was out of repair, had been for months, and was known by everybody to be. The degree of care the city was bound to exercise, though overstated in the instructions, could have done no harm when it is admitted the city failed

to exercise that degree of care. Dilapidated walks with boards lying loose, nails out of the stringers, some of the boards displaced, show conclusively the city had not done its duty. In stating plaintiff might presume its duty had been performed by the city and that the sidewalk was in a safe condition for use, the court would have committed prejudicial error on the issue of whether plaintiff used due care for her own safety, if there was any evidence tending to convict her of contributory negligence. But there is none, in our judgment. All the testimony as to how the accident occurred goes to prove she and another woman were walking side by side, after dark along the sidewalk in going from the postoffice; that her companion stepped on the end of a loose board which flew up, catching plaintiff on the lower part of her limb and inflicting the injury complained of. Not a word of evidence nor a circumstance is in proof to show any carelessness in the way plaintiff was walking at the time, and hence there is nothing to show lack of care on her part contributing to her injury, unless the bare fact that she used this walk when she knew it was in bad repair has that tendency. And in truth this is the only negligent act of which the answer accused her; for it said nothing about carelessness in her manner of walking. If she was to be found guilty of contributory negligence for merely passing along the walk, then everybody in New Madrid was guilty of carelessness nearly every day, for it was proved, and even admitted, the walk was in constant use by the public notwithstanding its condition. In the brief for defendant the concession is made that the sidewalk was on one of the main streets of the city and in general use. The lack of ordinary care for one's own safety consists in failing to use the caution which persons of common prudence use, and if plaintiff only did what every one else did, as respects the use of the walk, it cannot be said she was negligent, unless we assume that all the citizens of New Madrid lacked common prudence. It is not the law that a per-

son acts negligently when he uses a sidewalk he knows is in bad repair, or will be barred from recovery for doing so if he uses it cautiously. Such an act is careless only in case the walk is so unsafe that no person of ordinary prudence would attempt to walk over it. This has been declared many times and we will quote an excerpt from Coffey v. Carthage, 186 Mo. 573, 85 S. W. 532, as quoted and approved in Heberling v. Warrensburg, 204 Mo. 604, 617, 103 S. W. 36, on the question: "If he (a citizen) knows of a defect and it is not so obviously dangerous that no prudent person would attempt to use the street, he may still use the street provided he exercises that care which a reasonably prudent person would in like circumstances; but he is not bound, merely because he encounters a defect which a reasonably prudent man would think he could pass by the exercise of care, to avoid the street entirely." Though this sidewalk was out of condition, there was nothing tending to prove it was a desperate act to walk over it. Hence the second and third instructions requested by defendant were rightly refused.

Furthermore, the court in several instructions for plaintiff, required the jury to find as a condition on which a verdict might be awarded in her favor, she could not, by ordinary care, have avoided the consequences to herself of the defendant's negligence; and again, she could not recover unless the jury found "she was not at the time exercising reasonable care and caution in walking on said sidewalk." In an instruction given of the court's own motion, the jury were told plaintiff could not recover if she was aware of the condition of the walk and failed to exercise ordinary care to avoid the accident which caused the injury, though they might find defendant had failed to exercise ordinary care in keeping the walk in repair at the place where the injury happened, and might further find the injury would not have happened but for such negligence. A finding that plaintiff was in the exercise of due care was undoubted-

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ly exacted from the jury, whether it was necessary to do so or not; that is to say, even if there was no evidence tending to prove she was guilty of negligence contributing to her injury.

Great complaint is made that the damages were excessive, but we think they were moderate. Plaintiff testified she was still suffering from the injury at the time of the trial in October, 1908, nearly two years after the accident. She was disabled from pursuing her vocation for nearly a year and testified that when she resumed teaching she did so against the opinion of her physician. The only point of doubt is whether the court should have received evidence concerning the salary paid to her as a teacher, when the petition did not allege loss of time or earnings. The jury were not authorized in the instruction on the measure of damages to assess damages for loss of time and earnings, and we hold said item of evidence, whether rightly admitted or not, should not work a reversal of this judgment.

The judgment is affirmed. All concur.

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IDA B. PECK, Appellant, v. J. J. DUNNEVANT,  
Respondent.

St. Louis Court of Appeals, April 19, 1910.

1. **LANDLORD AND TENANT: Agreement for Lease: Statute: Construction.** The Landlord and Tenant Statute, section 4110, Revised Statutes 1899, providing that all contracts or agreements for the leasing, etc., of stores, houses, etc., not made in writing, signed by the parties thereto, etc., shall be held to be tenancies from month to month, etc., does not raise a monthly tenancy out of an agreement to demise premises for a definite term by a written contract, when the contract is never executed; the statute being intended to operate on all oral lease contracts, no matter for what period, and convert them into monthly tenancies.

2. ———: ———: **Creation of Tenancy.** Where a verbal agreement was made to demise premises for a definite term by a written contract, but the written contract was never executed, the relationship of landlord and tenant did not exist by virtue of the verbal agreement, and in default of the contract, that relationship would not be implied by law until the proposed tenant took possession, thereby signifying a purpose to become a tenant.
3. ———: ———: ———: **Action for Rent Will not Lie.** In such a case, an action for rent under section 4110, Revised Statutes 1899, will not lie, as the relationship of landlord and tenant does not exist; the aggrieved party being left to his ordinary remedy for damages at law, or whatever remedy he may have in equity.

Appeal from St. Louis City Circuit Court.—*Hon. Matt. G. Reynolds*, Judge.

**AFFIRMED.**

*Julian Laughlin and A. R. Russell* for appellant.

(1) The relation of landlord and tenant is established, not by virtue of occupancy of the premises, as the respondent contends, but by the plaintiff hiring the premises to the defendant, who can occupy them or not as he sees fit. 1 McAdam on Landlord and Tenant, p. 52. (2) The relation of landlord and tenant once being established, under the statute is presumed to be from month to month, unless the contrary be shown by written lease, and continues until terminated by mutual consent, operation of law, or by act of either party under the statute.

*Wilfley, McIntyre & Nardin* for respondent.

(1) An instrument or agreement will not be interpreted as a lease of any kind where it appears that it was the intention of the parties that a further formal lease should be executed. *Brewing Association v. Niederlueck*, 102 Mo. App. 203; *Ver Steeg v. Becker*, 106 Mo. App. 257. (2) Where there is a mere negotiation or

agreement to enter into a lease, merely stating the annual or monthly rental, and the lessee thereafter refuses to execute the lease submitted, the lessor must show that such a lease was submitted as the lessee had agreed to sign, and he must show this to make out a case on which he can recover, whether he attempts to recover on the lease, or damages for breach of contract to make a lease. *Hayden v. Lucas*, 18 Mo. App. 325. (3) Under a verbal agreement for leasing property where no possession is delivered, there is no tenancy from month to month under section 4110, R. S. 1899. *Express Co. v. Office Fixture Co.*, 72 Mo. App. 151; *Hardy v. Winter*, 38 Mo. App. 106; *Tincher v. Phillips*, 37 Mo. App. 621; *McKinley v. Railroad*, 40 Mo. App. 456. (4) Where there is possession of property under any kind of contract or agreement to lease, in such case section 4110, R. S. 1899, applies to make tenancy one from month to month. *Clark v. Thatcher*, 9 Mo. App. 436.

GOODE, J.—Plaintiff sued for the rent of a dwelling house on Cates avenue in St. Louis, No. 6049, for the months from November, 1907, to March, 1908, inclusive, that is, four months at \$55 a month or \$220, less a credit of \$10. The action went from the magistrate's court to the circuit court where the defendant had judgment and plaintiff appealed. The facts are these: The premises were in the charge of Woolley & Fish, as rental agents, to whom the wife of defendant Dunnevant applied about the middle of October, 1907, to rent the property. She informed Mr. Woolley what improvements she wanted made and left a deposit of ten dollars with him to bind the rental. Plaintiff or her husband arranged with the tenant, who was then in occupancy and whose term would expire on November 14th, to move out three or four days before the first of November, in order to enable plaintiff to make the improvements desired by defendant. The understanding between de-

defendant's wife and Mr. Woolley was defendant's term should begin November first at fifty-five dollars a month; that a written lease should be prepared and sent to defendant to execute and he should move in by November first, or a few days before, if he wished. The written lease was prepared by Mr. Woolley and sent to defendant on October 26th to be executed, but meanwhile defendant had read in the newspapers an advertisement of a house on Bartmer avenue which was offered for sale and having found it suited him, purchased it. The result was that when the written lease was received by him, instead of signing it, he took it back to Woolley & Fish and declined to execute it, notifying them it had come too late as he had bought another property. These facts are undisputed, but defendant said the written lease contained terms he would not have agreed to in any event. The property remained vacant until March, when it was rented to another person and, as stated, this action is to recover the rent for the period of vacancy. The only question for decision is whether the property was so far leased to defendant as to make him a monthly tenant under the statute, or whether there was merely an agreement to lease it to him which was not carried out because he refused to execute the contract of lease. The action is under the Landlord and Tenant Statute and cannot be maintained unless the relation of landlord and tenant existed, as counsel for plaintiff admit. Conceding the understanding between plaintiff and defendant that there should be a letting for a definite term (the length of which however is nowhere stated) and the contract should be expressed in a written instrument; conceding, too, this understanding never was consummated, counsel for plaintiff say nevertheless what transpired constituted defendant a tenant of plaintiff from month to month by force of the statute which says "all contracts or agreements for the leasing, renting or occupation of stores, shops, houses, tenements or other buildings in cities, towns and vil-



lages, not made in writing, signed by the parties thereto or their agents, shall be held and taken to be tenancies from month to month and all such tenancies may be terminated by either party thereto, or his agent, giving the other party, or his agent, one month's notice in writing of his intention to terminate such tenancy." [R. S. 1899, sec. 4110.] They contend defendant is liable for the rent for the time the property was vacant because he became plaintiff's tenant from month to month and never terminated the tenancy by written notice in conformity to the statute. It is true the statute says all agreements for the leasing or letting of houses in cities not made in writing shall be taken as tenancies from month to month, but the question is whether that language operates to raise a monthly tenancy out of an agreement to demise premises for a definite term by a written contract, if the contract never is executed. We think the statute had<sup>n</sup> no such purpose, but was intended to operate on all oral lease contracts, no matter for what period, and convert them into monthly tenancies. If the defendant had taken possession of the premises under the verbal agreement with plaintiff's agents, probably the relation of landlord and tenant would have arisen in such sense that defendant would be liable for the reasonable value of the use of the premises, and his liability would have continued until he terminated it in the statutory mode. But defendant never took possession, and on the contrary before the time had arrived when he was to take possession, refused to carry out his agreement to become a tenant of plaintiff. The relation of landlord and tenant was not formed and, therefore, the present action, which depends on that relation, cannot be maintained. [Pacific Express Co. v. Tyler Co., 72 Mo. App. 151; Tincher v. Phillips, 37 Mo. App. 621; McKinley v. Railroad, 40 Mo. App. 449.] We will inquire further concerning the proposition advanced by counsel for plaintiffs. They insist all that was essential to create the

relation of landlord and tenant was an intention on the part of plaintiff to rent the premises to defendant, and an intention by him to take the premises; citing 1 McAdam, Lan. and Ten. 52. In our judgment this is a fallacious view of the case. It is apparent from all the testimony that neither plaintiff nor defendant understood the verbal agreement with Woolley & Fish was the contract which was to bring them into the relation of landlord and tenant. On the contrary, both understood the contract should be set forth in a writing stipulating for a definite term, which should be executed by the parties and thereupon said relation should arise between them. This being so, until the contract was executed there could be no such relation by virtue of the agreement it was to set forth; and in default of a contract the relation of landlord and tenant would not be implied by law until defendant took possession, thereby signifying a purpose to become a tenant. The author counsel for plaintiff have cited says where an agreement for a lease contains words of present demise and the circumstances show the tenant was to have an immediate legal interest in the term, the agreement will amount to an actual lease; but, on the other hand, though words of present demise are used, yet if it appears on the whole no legal interest was intended to pass, and the agreement was only preparatory to a future lease to be made, "the construction will be governed by the terms of the parties and the contract will be held not to amount to more than an agreement for a lease which equity will sometimes enforce." [McAdam, L. & T. (3 Ed.), sec. 59.] Another writer, in discussing the question of when an agreement for a lease will amount to a present letting, says if the understanding is a future formal lease is to be executed, that is a circumstance against a present letting. Further, that if there are no clear, explicit or unequivocal words of present demise, a provision for the execution of a lease in the future will usually be regarded as raising a presumption that the parties in-

tended the prior agreement as one for a lease and not as the lease itself. [1 Underhill, L. & T., sec. 176 and cases cited.] The same writer says, in the same section, the lessee's taking possession of the demised premises is of great force in showing the intention was to create an immediate tenancy. In the next section it is said if the language of the agreement amounts only to one for a lease and it is violated by either party, the opposite party will have a cause of action for any damages accruing from the breach and sometimes may file a bill in equity for specific performance of the agreement. We cannot think our statute which reduces verbal contracts for the demise of premises in a city to month to month demises, was enacted with a view to turn every verbal contract to give a written lease for a stated period into a monthly tenancy, if the party who is to be lessee in the written lease decides not to execute it. In our opinion such a contingency was not provided against by the Legislature, but the aggrieved party was left to his ordinary remedy for damages at law, or whatever extraordinary remedy he may have in equity.

The judgment is affirmed. All concur.

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JOSEPH GERARDI et al., Appellants, v. HARVEY L. CHRISTIE, Trustee et al., Respondents.

St. Louis Court of Appeals, April 19, 1910.

1. **APPELLATE PRACTICE:** Finding by Chancellor. In an equity case, the appellate court will defer to the finding of the court below, where it is in doubt as to which of two theories is the correct one under the evidence.
2. **DEEDS: Time of Delivery: Presumption.** A deed is presumed to have been delivered on the day it was acknowledged, though dated before.
3. **MORTGAGES: Assumption of Incumbrance by Purchaser of Mortgaged Property.** A purchaser of land subject to a deed of trust, who agreed to pay a note secured thereby, became pri-

marily responsible for the debt, instead of the maker, and any holder of the note could sue him thereon, and, the stipulation being for his vendor's benefit, the latter would be entitled to redress against him, if damaged by his failure to pay.

4. ———: **Payment or Purchase of Mortgage: Evidence: Inferences.** Where a note and a deed of trust securing it were transferred, a check given by the transferee reciting it was in payment "for" and not "of" the note and deed of trust favors the insistence of the transferee that the transaction was a purchase and not a payment.
5. ———: **Acquisition of Mortgage Debt by Owner of Fee: Merger.** When the owner of the fee acquires an incumbrance for which he is primarily responsible, it is merged in the fee.
6. ———: ———: ———: **Equity Follows Rule at Law.** Equity follows the rule of the common law as to merger, where the owner of a fee acquires an incumbrance for which he is primarily responsible, and the rule properly applies to a grantee who assumes an incumbrance created by his grantor, and subsequently buys it in.
7. ———: ———: ———: **Outstanding Title in Trustee.** An outstanding title in a trustee will prevent a merger of a deed of trust in the fee when the holder of the latter buys the secured debt, for he acquires no interest as regards the land, except to have it sold by the trustee in the event of a default—that is, he does not acquire an estate which will merge in the larger estate he holds already, but only a right.
8. **TRUSTS: Incumbrance on Trust Property: Rights and Liabilities of Trustee.** Though one who held title to a lot in trust for himself and associates and a corporation which they meant to form, and who was not bound to pay for it out of his own funds, but with money furnished by his associates or to be raised on bonds of the corporation secured by a deed of trust on the lot, was bound, as against other parties in interest, by his contract with his vendor to discharge a note secured by a trust deed of the lot, he was not bound to do so as against his associates or a subsequent purchaser at a sale of the lot under another trust deed; but while he stood in a fiduciary capacity to his associates or to the corporation, he could not lawfully hold the note which he acquired and dispose of it to the prejudice of the corporation, or so as to deprive it of the right to pay it and discharge the lien.
9. ———: ———: ———. One holding title to a lot in trust for himself and others had an interest therein which warranted him to acquire a note secured by a trust deed on the lot, if

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necessary to prevent a sale under the deed, and, if he purchased the note, he was not a mere volunteer in the transaction.

10. **MORTGAGES: Assignment: Defenses Against Purchaser: Bills and Notes.** Where one holding title to a lot in trust for himself and associates and a corporation which they meant to form bought a note secured by a trust deed on the lot, defenses in favor of his associates or the corporation as against him, on the score that he acquired the note contrary to the trust, and other defenses growing out of their relation with him, except that of payment with their money, were collateral, unconnected with the note, and not available against one who purchased the note from him in good faith after maturity.
11. ———: ———: ———: **Merger.** A note secured by a trust deed on a lot was not paid by its purchase by one holding title to the lot in trust, if he bought it with his own money without intending to pay it, and hence he could sell it as the one from whom he bought could have done.
12. ———: ———: ———. Where the owner of the fee acquires title to an outstanding mortgage for which he is not individually responsible, no merger of the mortgage in the fee will be permitted, if he intended there should be no merger when he acquired it but, instead, that it should be kept alive for his benefit.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

**AFFIRMED.**

*R. M. Nichols* for appellants.

(1) Gardner's contract under date of September 28, 1906, to pay as a part of the purchase money, the deed of trust dated September 29, 1905, executed by L. I. Finegan, for the sum of \$2500, as shown by the contract of purchase, and his confirmation of that contract and further contract under date of October 8, 1906, as contained in the deed of the Euking Realty Co., to him, made the debt his own; and his attempted purchase, or assignment of that note, would under such contractual relation *ipso facto*, amount to a satisfaction and cancellation of the debt. 1 Jones on Mortgages (4 Ed.).

sec. 864; *Nelson v. Brown*, 140 Mo. 581; *Allen v. McDermott*, 80 Mo. 56; *Heim v. Vogel*, 69 Mo. 529; *Kellogg v. Schnaake*, 56 Mo. 136; *Wonderly v. Giesler*, 118 Mo. App. 709; *Pomeroy's Eq. Jur.*, secs. 797, 1206, 1213; *Birke v. Abbott*, 103 Ind. 7; *Drury v. Holden*, 121 Ill. 137; *Hartshorne v. Hartshorne*, 2 N. J. E. 349; *McCable v. Swap*, 96 Mass. 188; *Carleton v. Jackson*, 121 Mass. 592; *Kneeland v. Moore*, 138 Mass. 198; *Winans v. Wilkie*, 41 Mich. 264; *Biles v. Kellogg*, 67 Mich. 318; *Ely v. McKnight*, 30 How. Pr. 97; *Mickles v. Townsend*, 18 N. Y. 575; *Natl. Investment Co. v. Norden*, 50 Minn. 336; *Johnson v. Walton*, 60 Iowa 315; *Fouck v. Delk*, 83 Iowa 297; *Bank v. Stone*, 97 Iowa 183; *Lewis v. Starkey*, 10 Sm. & M. (Miss.) 120; *Fretwell v. Branyon*, 67 S. C. 95; *Wilson v. Burton*, 52 Vt. 394; *Bier v. Smith*, 25 W. Va. 830. (2) According to the court's finding *Gardner*, when he purchased the note, was acting in his individual interest. The rule is well settled that when an agent is acting for himself and not his principal, the rule does not apply that the principal is bound by the acts of the agent, and therefore the reasoning of the court that the *Gerardis* would be bound by the act of *Gardner* in selling the deed of trust to *Mitchell* would not apply. *Bank v. Keyser*, 127 Mo. App. 63; *Hinkle v. Lovett*, 114 Mo. 519; *Smith v. Boyd*, 162 Mo. 146. (3) *Gardner*, being the agent of the *Gerardis*, could not by a contract with *Carter* to keep the note alive, place himself in a hostile attitude to his principal, and this whether the fund he used to pay or purchase the note was his own fund, or the fund of the *Gerardis*. *Story on Agency* (8 Ed.), secs. 210, 211; *Grumbley v. Webb*, 44 Mo. 444; *Harrison v. Craven*, 188 Mo. 590; *Montgomery v. Hundley*, 205 Mo. 138. (4) The notation on the check "in payment of the deed of trust" does not mean purchase, but means payment, and is at variance with both *Carter* and *Gardner's* testimony as to intent when the note and deed of trust were delivered by *Carter* to *Gardner*. *Clay v. Lakenan*, 101 Mo. App. 568; *White*

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v. Black, 115 Mo. App. 28; Hopson v. Axle & Spring Co., 50 Conn. 597; Bradford v. Richard, 46 La. Ann. 1530.

(5) The contract by which Gardner assumed and agreed to pay the note, contained in the deed placed of record, was notice to Mitchell. Smith v. Boyd, 162 Mo. 146; Hudson v. Cahoon, 193 Mo. 547; Magie v. Reynolds, 51 N. J. E. 113, 26 Atl. 150; Hoppe v. Szezeponski, 209 Ill. 88. (6) It was not shown that Gerardi knew that Gardner on October 23, 1906, had paid off the mortgage when he brought the attachment suit November 9, 1906, for the full amount, or that Gerardi had received anything by his attachment, or that Mitchell acted upon Gerardi's claim for the full amount, or that he was misled by Gerardi's claim as stated in the petition, or that he was a party to such suit, either of which would be necessary in order to estop Gerardi from taking the present position that the mortgage was *ipso facto* satisfied by the payment by Gardner, or that the payment by Gardner was out of funds belonging to Gerardi which he had received for that purpose. 16 Cyc., p. 796.

(7) The \$18,702.79 was confessedly trust funds in the hands of H. B. Gardner. If the \$18,000 (less the \$500) was not trust funds in the hands of Gardner for the benefit of the Gerardis, Gardner mixed the same in his bank account with the Gerardis' trust fund in his name, thereby making the entire account a trust fund. The payment of the note out of the fund on October 23, 1906, should be held to be a payment out of the trust fund. Snodgrass v. Moore, 30 Mo. App. 232; Bank v. Life Ins. Co., 104 U. S. 54; 28 Ency. Law, p. 915, tit. "Confusion of Property." (8) The covenants of warranty in the deed of trust from Gardner to the Euking Realty Company for the purchase money under date of October 8, 1906, under which the plaintiff, Rookery Realty, L., I. & R. Company claims title, and which are implied from the words grant, bargain, sell, convey and confirm, would estop Gardner from purchasing the Finegan mortgage and selling it, because such act would be in

derogation of his warranty. *Bohlcke v. Buchanan*, 94 Mo. App. 320; *Mickels v. Townsend*, 18 N. Y. 575; *Butler v. Stewart*, 96 Mass. 466; *Murphy v. Simpson*, 42 Mo. App. 654. (9) The plaintiffs are not estopped from showing the invalidity and satisfaction of the deed of trust under the facts in this case. *Brooks v. Owens*, 112 Mo. 551; *Lewis v. L. & B. Assn.*, 183 Mo. 351.

*Bryan & Christie* for respondents.

(1) The Rookery Realty, Loan, Investment and Building Company acquired the property in question by a deed which expressly recited that it was subject to the second mortgage which was held by respondent Mitchell, and it cannot now dispute the fact of that second mortgage, or its validity. 1 *Jones on Mortgages* (5 Ed.), sec. 744; *Water Works v. Loan and Trust Co.*, 30 C. C. A. 133; *Guernsey v. Kendall*, 35 Vt. 201; *Landau v. Cottrill*, 159 Mo. 308; *Young v. Com. Co.*, 158 Mo. 395; *Davis v. Tandy*, 107 Mo. App. 437; *Parkey v. Veatch*, 164 Mo. 375. (2) The money which was used by Gardner in purchasing the note from Carter was Gardner's own money, and was not the money of Joseph Gerardi, Jr., and the note was the property of Gardner Bros. & Co., when it was by them sold to defendant Mitchell. Finding of Judge Muench, appellant's record, pp. 324, 325 and 328. (3) Even if Joseph Gerardi, Jr., had been the owner of the note, still, if he so acted as to place it under the control of Gardner, and enabled Gardner to deal with it as if he, Gardner, were the true owner, and since defendant Mitchell is an innocent purchaser of said note for value, no equity could possibly attach to the note in favor of Gerardi, Jr., as against Mitchell; and this is true even though Mitchell did purchase the note after its maturity. *Lee v. Turner*, 89 Mo. 489; *Gardner v. Trust Co.*, 76 N. E. 455, 2 L. R. A. (N. S.) 767. (4) Not only has there been no payment of the note in fact, but



there has been no merger. (a) This is a suit in equity, and in equity estates are kept distinct when the interest of either party requires it. Mergers are not favored, and never take place contrary to the intention of the parties or the requirements of justice. *Chrisman v. Linderman*, 202 Mo. 605; *Jones on Mortgages* (5 Ed.), sec. 848; 20 Am. and Eng. Ency. Law, 590. (b) The record title to the equity of redemption held by Gardner, he held as trustee for the Monarch Realty & Building Company. The right which he acquired to the note, he acquired in his own right, and no merger can take place, even at law, unless the right previously held and the right subsequently acquired coalesce in the same person and in the same right. *Jones on Mortgages* (5 Ed.), sec. 848; *Curry v. Lafon*, 133 Mo. App. 163. (c) Between the record title to the equity of redemption in Gardner and the right which he acquired to the note by purchase, there intervened the right of the Monarch Realty & Building Company, which was at that time the real beneficial owner of the property in question. There also intervened the legal title of Harvey L. Christie, the trustee in the deed of trust securing that note. Because there was an intervening title between the right held by Gardner prior to the time when he purchased the note, and the right which he acquired by the purchase of the note, there could be no merger. *Jones on Mortgages* (5 Ed.), sec. 848; *Curry v. Lafon*, 133 Mo. App. 163; *Kellogg v. Ames*, 41 N. Y. 259; *Rouse v. Johnson*, 66 Mo. App. 57; *Hospes v. Almstedt*, 13 Mo. App. 270. (d) Nor does it make any difference in this case that in the deed by which the Euking Realty Company conveyed the property in question to Gardner, it was recited that the purchaser assumed to pay the deed of trust here in question. Such agreement was in no sense made for the benefit of the Rookery Realty, Loan, Investment and Building Company, who succeeded Gardner in the title and who acquired the property

subject to the second deed of trust. *Kelly v. Staed*, 126 Mo. 430; *Sater v. Hunt*, 66 Mo. App. 527; *Kellogg v. Ames*, 41 N. Y. 259; *Wallach v. Schulze*, 22 App. Div. (N. Y.) 57; *Jones on Mortgages* (5 Ed.), sec. 853; *Powell v. Smith*, 30 Mich. 451; *Goodwin v. Kene*, 47 Conn. 486; *Pingree on Mortgages*, sec. 1066.

GOODE, J.—This action is in the nature of a suit in chancery and was filed to have defendant Christie enjoined from selling a parcel of ground situate in city block No. 3881 in the city of St. Louis, fronting 225 feet on the east line of Kingshighway and extending eastwardly 150 feet along the north line of Maryland avenue; the depth eastwardly being 180 feet on the north boundary of the lot. The threatened sale was pursuant to a power conferred on Christie as trustee and party of the second part in a deed of trust executed by Louis I. Finegan, September 29, 1905, to secure Thomas P. Plumridge of the third part as payee of a note for \$2500. When the present action was commenced, defendant Leonidas S. Mitchell was the holder and owner of said note, claiming to have acquired it by purchase from Gardner Bros. & Co., a firm composed of Harry B. Gardner and James P. Gardner, to whom it had been transferred by John S. Carter, assignee of the payee, Plumridge. Mitchell paid Gardner Bros. & Co., \$2300 for the note on November 12, 1906, and after it had fallen due on September 29, 1906, it having been given to run one year. When this action commenced the Rookery Realty, Loan, Investment and Building Company was the owner of the property on which the note was secured, and plaintiff, Joseph Gerardi, Jr., was a stockholder in said company, a contributor to the money paid for the lot, and according to the testimony for plaintiffs, to the fund used to take up the note in suit. The questions on which depended the right of plaintiffs to the relief they asked were, whether the

note secured by the deed of trust had been paid prior to its acquisition by Mitchell, and if it had been paid, whether Mitchell was an innocent purchaser for value and entitled, as against these plaintiffs to enforce the collection of it by sale under the deed of trust. Prior to 1906 Joseph Gerardi, Sr., his wife Annie Gerardi and their son Joseph Gerardi, Jr., had been engaged in the hotel business in the city of St. Louis. Their business was transacted partly in the name of the son and partly in the name of a corporation known as the Jos. Gerardi Hotel Company. They desired to conduct a larger establishment than the one or more they had been conducting, and this wish led them into transactions with Harry B. Gardner, who was a real estate broker in the city of St. Louis and represented himself to be an architect. The Gerardis became acquainted with Gardner in September, 1906, and he undertook, with their approval, to acquire the title to the property on Kingshighway and Maryland avenue above described, with a view to the erection of a hotel building on it. The title was in the Euking Realty Company, subject to a first deed of trust for \$47,500, executed by Thomas P. Plumridge to B. F. Mathias, as trustee for the Collier estate, and by a second deed of trust to secure a note for \$2500, executed by L. I. Finegan, to whom Plumridge sold the property; that is to say, the note and deed of trust in controversy in this case. Finegan had conveyed to the Euking Realty Company from whom Harry B. Gardner acquired the property pursuant to his arrangement with the Gerardis. The Euking Realty Company conveyed to Gardner, October 8, 1906, by a warranty deed which recited it was subject to the two prior deeds of trust we have mentioned and that Gardner assumed and agreed to pay them. Gardner paid \$20,000 in cash on the purchase price of the property in two installments, of which the last was paid October 8th, and executed a third deed of trust to Henry R. Weisels, as trustee for the Euking Realty Company for

\$45,000, which conveyance recited it was subject to the two prior deeds of trust. Those three incumbrances and the cash payment made up the price, \$115,000. By a deed dated October 19th, but acknowledged October 30th, and recorded November 5th, Gardner conveyed the property to the Monarch Realty Company, a corporation which had been formed to take over the title, the stockholders being the Gerardis, Gardner and a man named Beal. This deed to said company recited it was subject to the first two deeds of trust, the second of them being the one the foreclosure of which is sought to be enjoined. On October 23, 1906, Gardner took up the note for \$2500 secured by said second deed of trust, which note, as said, was then owned by John S. Carter. Gardner paid Carter for the note by the following check drawn on the Commonwealth Trust Company:

"St. Louis, Oct. 23, 1906.

"COMMONWEALTH TRUST COMPANY,

"Pay to the order of John S. Carter (\$2513.34)  
Twenty five Hundred and Thirteen and 34-100 dollars.

"In payment in full for D. T. on

"Maryland and Kingshighway property.

"(Signed) H. B. GARDNER."

On September 27, 1906, the Gerardis had turned over to Gardner a certificate of deposit on the National Bank of Commerce, for \$18,702.79, to pay on the purchase price of the lot. The Gerardis testified Gardner represented he had paid \$20,000 out of money of his own deposited in the Commonwealth Trust Company and they gave him the certificate to reimburse him. Gardner used \$5000 of the proceeds of the certificate of deposit to pay on the price of the lot that day and placed the remainder to his credit in the Commonwealth Trust Company, where at the time he had a deposit of \$6.47. Later he drew various checks on the account for his own purposes, so that on October 8th, when he paid

the Euking Realty Company \$15,000 on the price of the lot, he had on deposit only \$11,394.79 of the original fund. This is an important fact; because before making the payment he increased his account by a deposit of \$18,000, and out of this deposit he later paid the note in dispute. One question is as to whose money was deposited, his or the Gerardis'; and the significance of this question will develop as the facts are told. It was on September 28th that Gardner entered into a written contract with the Euking Realty Company for the purchase of the property, which contract stated the terms of the purchase and was afterwards carried out on October 8th by the Euking Realty Company executing a deed to Gardner. The original contract of September 28th between Gardner and the Euking Realty Company bound the former to pay the note in dispute as part of the consideration for the sale of the lot to him; the deed was recorded and the contract was not. The Gerardis said the understanding between them and Gardner was the title was to be taken in the name of Joseph Gerardi, Jr., and because it was not, and also for other reasons, a bitter quarrel and litigation ensued finally between the Gerardis and Gardner. Meanwhile, on October 8th, the Gerardis turned over to him a cashier's check on the Fourth National Bank of St. Louis for \$18,000, in a transaction, the real nature of which is in dispute between them and Gardner. They say this check was delivered to him to pay off a mortgage for \$16,500 which he had represented was on the property and had to be paid in order to prevent a foreclosure sale; also to pay him the difference between the prior certificate of deposit, \$18,702.79, and the \$20,000 he represented he had paid out of his own funds on the price of the lot, and that he returned them by check \$500 remaining after those items were settled. Gardner's version about why the cashier's check for \$18,000 was turned over to him on October 8th is this: The Monarch Realty & Building Company had been organized

about October 5, 1906, with a capital stock of \$600,000, divided into 6000 shares of the par value of \$100 each, of which Gardner had subscribed for 2500 shares, Joseph Gerardi for 2500 shares and George E. Beal for 1000 shares. As stated above, Gardner conveyed the lot in question to said corporation, which was organized to receive the title and erect on it a hotel building. Gardner testified the Gerardis became dissatisfied because he and Beal had a majority of the stock of the corporation and to get control agreed to pay him \$30,000 for 1500 shares of his stock which were to be transferred to Jos. Gerardi, Jr. There is a discrepancy in the testimony about this matter, Joseph Gerardi testifying he was to get 995 shares of Beal's stock as well as 1500 shares of Gardner's. However that discrepancy is not material in the present controversy. But it is material that Joseph Gerardi, Jr., denied the cashier's check on the Fourth National Bank was given to pay for the shares he bought, whatever their number was. The purpose for which the check was turned over to Gardner is important, for the reason that if this was done to pay for his shares, the proceeds of the check were his own, but if he took it under an agreement to use the proceeds in partly paying for and discharging incumbrances on the lot they were not his own. Gardner and Beal testified said check was delivered to Gardner to pay for 1500 shares of his (Gardner's) stock, leaving the Gerardis indebted on the price in the sum of \$12,000. Regarding the check for \$500 he gave back to the Gerardis, Gardner testified, in effect, he was allowed a commission on the purchase of the lot and had agreed to divide it with the elder Gerardi; that after deducting a sum paid to another real estate man, the commission amounted to about \$1000 and he gave a check for half that sum. There is a mass of testimony in the record relating to this matter and as to how far and in what respects Gardner was the agent of the Gerardis and authorized to represent them in transac-

tions incident to the hotel enterprise. Indeed, the bulk of the very contradictory evidence relates to those matters and is so prolix we cannot summarize it further than is necessary to an understanding of the points raised on the appeal. No small part of the evidence is directed to the question of whether entries in the minute book of meetings of the Monarch Realty Company, which purported to confer certain powers on Gardner, were genuine records of directors' meetings of said company or had been forged at the instigation of Gardner. This evidence had to do in the present case with whether Gardner used his own money to pay the note in question, or the Gerardis', and also with the extent of his agency. If the story of the Gerardis about the cashier's check is true, when Gardner put the proceeds of it to his credit in the Commonwealth Trust Company and drew on it to pay Carter for the note in question, he paid for said note with money of the Gerardis and not with his own money; whereas if his version is true, and he had sold his stock, receiving in part payment said check, when he put the proceeds to his credit and afterwards drew on the account to pay for the note in question, then inasmuch as the proceeds of the check or certificate first furnished him by the Gerardis had been exhausted, he paid with his own money and took over the note for himself and not for the Gerardis. Still further stating the relevancy of the testimony, we remark that though it would not conclusively prove the note in question was purchased by Gardner and not paid if he used his own money in the transaction, that circumstance would favor the theory of a purchase. Gardner, it must be remembered, had accepted a deed from the Euking Realty Company to himself wherein this very note and the deed of trust securing it were recited, and a covenant was inserted whereby Gardner assumed and agreed to pay the note. He had executed a third deed of trust to secure a note for \$45,000 made by him, and in the third deed of trust

had recited the two prior ones, including the one in controversy; and, later, on October 19th, he had conveyed the property to the Monarch Realty & Building Company, reciting the first two deeds of trust, including this one, and saying the conveyance was subject to them. Hence it would be less probable that he intended to pay off and discharge the note and deed of trust in controversy if he used his own money in the transaction with Carter, than if he used money furnished by the Gerardis; because if he used his own money to pay the note and discharge the lien of the deed of trust by which it was secured, it is not clear how he expected to reimburse himself. The learned trial judge deemed Gardner's version was supported by the weight of evidence and that he had paid for the note with his own funds. The Rookery Realty, Loan, Investment & Building Company came to be interested in the property in this way: It was organized in December, 1906, by the Gerardis and employees in their hotel and under their control, to acquire the title to the property and acquired the title by a sale under the third deed of trust executed by Gardner to secure the note given by him for \$45,000. The trustee in that deed of trust was Henry R. Weisels, who sold under the power conferred in it, December 27, 1906, and James J. McDonald bid it in for the Rookery Company and after getting a deed from the trustee, Weisels, conveyed the title to the Rookery Company. This sale and purchase seem to have been intended to cut out the title of the Monarch Realty Company. The notice of the sale as advertised, stated it would be made subject to the first deed of trust for \$47,500 and the second deed of trust for \$2500. This advertisement was read at the sale. McDonald's deed to the Rookery Company warranted the title except as to taxes of 1907 and "except also against all incumbrances now of record on said property." Carter, who sold the note in controversy, and Gardner, who bought it, practically coincide as to the facts of the transac-



tion. Both say Gardner asked that the note be not marked paid or cancelled, stating he could not pay it off until he had procured action by the board of directors of the corporation for which he was acting. Carter had been pressing for payment of the note and Gardner said he would pay it to protect the company he represented; that he would pay it or take it up with his own money, but wanted it turned over to him uncanceled so he would be secured pending the action of the board of directors of the company. Carter agreed to do this for the accommodation of Gardner, saying the note was past due and he did not propose to await the action of the board of directors. Harry B. Gardner says he induced his brother, James P. Gardner, who was a street car conductor in East St. Louis, but a man of some means, to take over the note for the amount the former paid for it. This was done according to Harry B. Gardner's testimony, because he was unable to carry the note. The court below found he was the real holder and owner and his brother's apparent interest in the note was colorable. Subsequently, on November 12, 1906, as stated, the note was sold by Gardner to Leonidas S. Mitchell, who, before buying, made inquiries of the Euking Realty Company and of Christie, the trustee in the deed of trust, regarding the circumstances of the issuance of the note and how it was secured; also of the incumbrances on the property. The officers of the Euking Realty Company represented the note to be a valid obligation and secured by a recorded deed of trust. The note is in evidence and shows no indorsement except one in blank and without recourse made by the payee Plumridge. Mitchell was aware the Gerardis had brought an attachment suit against Harry B. Gardner, and required both members of the firm of Gardner Bros. & Company to sign a statement that the note was the property of the firm and no one else was interested in it; also to guarantee its payment within one year from the date of purchase.

Mitchell acquired knowledge of the attachment action the Gerardis had filed through his office of treasurer of the Commonwealth Trust Company, which was garnished in the action. Before buying the note he made no inquiries of the Gerardis about it, but learned from another source Gardner had given a third mortgage on the property to secure the note for \$45,000 to the Euking Realty Company. The court below found Mitchell purchased the note after maturity and in good faith. In the latter part and about the 20th of October, the Gerardis had the title to the lot examined by an attorney, they having become alarmed and suspicious of Gardner, and it must have been ascertained then the deed of trust to secure this note was still unsatisfied. Plaintiffs prosecuted this appeal from a judgment dissolving the temporary injunction and dismissing the petition.

Though no objection was made to the joinder of the Rookery Company and Jos. Gerardi, Jr., as plaintiffs, or that the petition was multifarious, we deem it well to remark that reasons differing in some particulars might be advanced for the relief of the two plaintiffs. Both would rely on the contract between the Euking Realty Company and Gardner by which the latter bound himself to pay the note and on Mitchell having purchased it after maturity; but Jos. Gerardi, Jr., asserts he contributed part of the money paid by Gardner on the price of the lot and part of the very fund used to take over the note; whereas the Rookery Company had no part in those transactions, and indeed was not organized until later, in December, when it acquired title to the lot with notice of all prior transactions and facts, particularly that the deed of trust to secure the note in controversy remained unreleased on the record in the office of the recorder of deeds. Moreover, the Rookery Company labors under the disadvantage of having acquired title at a sale by a trustee who had advertised the land would be sold subject to the deed of trust in question and who executed to the

Rookery Company a deed which recited the title was conveyed subject to existing incumbrances. It follows the only basis for a decree in favor of the Rookery Company to restrain defendant Christie from selling as trustee is that the debt secured by the deed of trust under which he would sell and the deed itself had been paid and extinguished as against any party interested in the lot, even though the interest was acquired subject to "existing incumbrances." Otherwise stated, its right to relief would depend on proof that the debt in question is not, in any contingency, an existing incumbrance. If Joseph Gerardi, Jr., furnished part of the money used to take up the note, he might argue plausibly that the note and deed of trust ought to be declared discharged in his favor. For reasons which cannot be made clear without a more minute criticism of the evidence than we can allow space for, we remain in doubt about whether money furnished by the Gerardis was used for this purpose or Gardner used his own money, and shall defer to the finding of the court below that the latter hypothesis is the true one—a conclusion which leaves Jos. Gerardi, Jr. with but little more equity in his favor than his co-plaintiff enjoys. On the day when Gardner acquired the note, October 23, 1906, he yet held title to the lot subject to incumbrances, for his deed to the Monarch Realty Company, though dated October 19th, was not acknowledged until October 30th and presumably was not delivered until then. Having agreed in his contract with the Euking Realty Company to pay this note as part of the consideration for the lot, he became primarily responsible for the debt, instead of Finegan, the maker, and Carter or any other holder of the note would have had an action against him upon it; and as the stipulation was for the benefit of the Euking Realty Company, it would have been entitled to redress against him for a failure to pay whereby it was damaged. [Nelson v. Brown, 140 Mo. 580, 41 S. W. 960; Crone v. Stinde, 156 Mo. 262,

56 S. W. 907.] Having acquired the fee of the property in a contract obligating him to pay the note, counsel for plaintiffs insist his transaction with Carter was a payment, regardless of whether or not he and Carter intended it should be; and *a fortiori* because the check given by Gardner to Carter showed that was the intention. The check favors defendant since it purports to have been given in payment "for" not "of" the deed of trust. Said counsel invoke the rule that when the owner of the fee of a parcel of land which is subject to an incumbrance the owner is primarily responsible for, acquires the incumbrance, it is extinguished by merger in the fee and the merger cannot be prevented by having the holder of the secured debt go through the form of transferring it to the owner of the fee. [2 Pomeroy, Eq. Jur. (3 Ed.), sec. 797; 3 Pomeroy, secs. 1206, 1213; 1 Jones, Mortgages (6 Ed.), secs. 864, 865; Crow v. Stinde, supra; Heim v. Vogel, 69 Mo. 529; Kellog v. Schnaake, 56 Mo. 136; Johnson v. Walton, 60 Ia. 315; Birke v. Abbott, 103 Ind. 1; Drury v. Holden, 121 Ill. 137; Hartshorne v. Hartshorne, 2 N. J. Eq. 349; McCabe v. Swope, 96 Mass. 188; Carleton v. Jackson, 121 Mass. 592.] Equity follows this rule of the common law, as it prevents owners from using incumbrances they have discharged to screen titles from adverse claims, say for dower, other liens, or debts at large. And it is properly applicable to the case of a grantee who assumes and agrees to pay an incumbrance created by his grantor and subsequently buys in the incumbrance. The circumstances of the litigation at bar should be critically examined to see if it falls within the reason of the rule; and when we pierce to the heart of the case we perceive Gardner was only technically the owner of the fee when he obtained the note from Carter. In truth he was hardly that, for the fee was secondarily in Christie as trustee in the deed of trust in dispute, primarily in Mathias, trustee in the first or Collier deed of trust, and next in Weisels, trustee in the third deed of trust

held by the Euking Realty Company. These are material facts, particularly the outstanding fee in Christie, touching the question of whether the Carter deed of trust could merge in Gardner merely in consequence of his acquiring the note; for it seems an outstanding title in a trustee will prevent a merger of the deed of trust in the fee when the holder of the latter buys the secured debt, for he acquires no interest as regards the land, except to have it sold by the trustee in the event of a default; that is, does not acquire an estate which will merge in the larger estate he holds already, but only a right. [*Hospes v. Almstedt*, 13 Mo. App. 270, 273; *Curry v. Lafon*, 133 Mo. 163, 179, 113 S. W. 246; *Jones, Mortgages* (6 Ed.), sec. 848, p. 984.] We merely allude to this doctrine without in the least resting our decision on it, being concerned with the fact that Gardner, if he held the legal title, did not hold it beneficially, or, at least only partly so. He held in trust for himself and associates and the corporation they meant to form. He was not to pay for the lot out of his own funds, but with money furnished by the Gerardis or to be raised on bonds issued by the corporation and secured by a deed of trust on the property. Therefore, though as against other parties in interest he was bound by his contract with the Euking Realty Company to discharge the note, he was not bound to do this as against the Gerardis, much less as against the Rookery Company. Gardner had an interest in the lot which warranted him to acquire the note, if that was necessary to prevent a sale under the deed of trust, and if he did this by purchase, as he and Carter testified, and as the court below found, he was not a volunteer in the transaction. It is true he stood in a fiduciary capacity to the Gerardis and Beal, or to the then formed Monarch Realty Company, and could not lawfully hold or dispose of the note to the prejudice of said company, or so as to deprive it of the right to pay it and discharge the lien. It does not appear he was acting in the particular transaction ad-

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versely to his associates, if, as the court found, he used his own means to buy the note. On the contrary the fair view is that he was protecting his own and their interest in the lot from a foreclosure sale. There are no equitable defenses on the part of the Gerardis or the Monarch Realty Company against this note in the hands of Mitchell. If they would have defenses as against Gardner on the score that he acquired it contrary to his trust, or other defenses growing out of their relation with him (except the rejected theory of his having paid it with their money) these defenses were collateral, unconnected with the note and not available even against a purchaser in good faith after maturity. [Cutler v. Cook, 77 Mo. 388; Barnes v. McMullins, 78 Mo. 260; Knaus v. Givens, 110 Mo. 58, 19 S. W. 535; Kelly v. Staed, 136 Mo. 430, 37 S. W. 1110; Gardner v. Beacon Trust Co. (Mass.), 2 L. R. A. (n. s.) 767.] In other words Gardner might purchase the note and collect it out of the property if it was not paid by his associates or their corporation, unless they or it had some collateral demand or counterclaim against him which would prevent. In any event it was not paid if he bought with his own money without intending to pay it and, therefore he might sell to Mitchell as Carter might have done. If the doctrine of merger has anything to do with the case, then considering the circumstances and the position of these plaintiffs, the rule connected with that doctrine which may justly be adopted is not the one counsel for plaintiffs cite, that a merger necessarily ensues when the owner of the fee who is primarily responsible for the payment of a mortgage or other lien on land acquires the incumbrance; but the rule of equity that when the owner of the fee acquires title to an outstanding incumbrance on the property, say a mortgage, for which he is not individually responsible, no merger of the incumbrance in the fee will be permitted if the intention of the owner when he acquired the incumbrance was that there should be

none, but instead the incumbrance should be kept alive for his benefit. [2 Pomeroy, secs. 790, 791; Jones, Mortgages, sec. 848; Chrisman v. Linderman, 202 Mo. 605, 100 S. W. 1090; Collins v. Stocking, 98 Mo. 290, 11 S. W. 750; Atkinson v. Augert, 56 Mo. 515; Sater v. Hunt, 66 Mo. App. 527.] We concede that if Gardner had been in truth the owner of the fee for his own benefit and held in no trust capacity and had personally assumed the note, then not only those with whom and for whose benefit he stipulated to pay the note in question, but all other persons then or thereafter interested in the property, would have been entitled to have the transaction with Carter treated as an absolute extinguishment of the debt; unless, perchance, Mitchell might have been heard to defend on the ground the Gerardis had enabled Gardner as their agent, to mislead him about the note, a question we will not go into. Aside from a possible defense on that ground, the note or lien would have been discharged. [Kellog v. Schnaake, Heim v. Vogel, supra; Murphy v. Simpson, 42 Mo. App. 654.] But as regards these plaintiffs, Gardner was in no just sense obligated primarily, or at all, to pay the note in controversy and was in no real sense the owner of the fee. In the essence of the case plaintiffs are endeavoring to take advantage of Gardner's having charged himself with a primary obligation in favor of the maker of the note, the holder Carter and the Euking Realty Company. According to the finding below Gardner not only acquired the note with his own funds and for the protection of his own interest and the interests of the Gerardis, but cherished the intention at the time, as was clearly established by his and Carter's testimony, not to pay the note and discharge the deed of trust, but to keep both alive and get them out of the hands of Carter, who was pressing for payment, and into the hands of a holder who would wait until money was raised by the pre-arranged plan of himself and associates, to take care of incumbrances. Under this

view of the case the question of merger becomes a secondary one, for when we get to the bottom facts they are that the note was not paid by Gardner, but bought, and he had a right to buy it as against the plaintiffs. The obvious result is the title to it passed from him, or from Gardner Bros. & Company, to Mitchell. Carter, who might have insisted on payment by Gardner, waived his right, according to his own testimony, and consented to a sale. The Euking Realty Company which also might have insisted on Gardner's obligation to pay, and perhaps on treating the transfer to him as payment, did not do so; for said company represented to Mitchell the note was yet a valid charge on the property. We find nothing in the conduct of Mitchell to indicate he acted in bad faith. Mitchell appears to have inquired of every possible source of information about the validity of the note before buying it; and, indeed, on the finding below there was nothing to invalidate it.

The judgment is affirmed. All concur.

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**DENT H. ROBERT, Respondent, v. CHICAGO &  
ALTON RAILWAY COMPANY, Appellant.**

St. Louis Court of Appeals, April 19, 1910.

1. **COMMON CARRIERS: Contracts: Place of Performance.** Where a citizen of California, starting with his baggage on the return trip from St. Louis to San Francisco, tendered, and the carrier accepted, his baggage pursuant to the terms of his ticket, which was purchased in San Francisco, whereby it became the duty of the carrier to transport the baggage from St. Louis to San Francisco, and there deliver it to the passenger, the place of performance of the contract was San Francisco.
2. ———: ———: ———: **Law Governing.** A contract evidenced by a railroad ticket is governed by the law of the place where it is made; and hence, where a passenger bought a return ticket



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in California, the law of that state governs its performance, unless the authority of its laws should be repudiated, because repugnant to the law and policy of this State, or as not affecting the contract because it was one for interstate carriage and subject to regulation by Congress.

3. ———: **Limiting Liability for Property Lost: Interstate Commerce: State Regulations.** Congress has enacted no law prohibiting agreements regarding the value of the property offered to carriers for interstate shipment and limiting the amount for which they will be liable if the property is lost while in their custody, and the national courts have sanctioned agreements between carriers and owners of property limiting the liability of the carrier for property received for carriage and lost during transit, provided such agreements are just, reasonable, and fairly entered into by the owner, and for a consideration; and such courts enforce state statutes regulating limitations of liability of carriers for interstate shipments in the absence of legislation by Congress.
4. ———: ———: **Consideration Necessary.** A stipulation in a ticket or bill of lading limiting the liability of a common carrier in order to be valid must be supported by an independent consideration, which is usually or invariably a lower fare or freight rate than the carrier charges for the same transportation under ordinary liability.
5. ———: ———: ———: **Differences in Application of Rule in State and Federal Courts: Burden of Proof.** The same rule with respect to requiring a consideration to support a stipulation for limiting the liability of a common carrier obtains in the Missouri and the Federal courts, but the former impose the burden of proving a consideration on the carrier, while the latter impose it on the shipper, presuming in favor of a consideration.
6. **STATUTES: Construction: Acts in Pari Materia.** Sections of statutes relating to the same subject-matter should be construed together in determining their meaning.
7. **COMMON CARRIERS: Limiting Liability for Property Lost: Stipulating Value: Consideration.** A stipulation of value contained in a ticket or bill of lading, if reasonable and made under proper conditions by the passenger or shipper, is regarded here, not as a restriction of the carrier's responsibility for negligence, but as a liquidation of the damages recoverable in the event the property is lost or damaged in any manner for which the carrier is answerable.

8. ———: ———: **Public may Insist on Shipping Without Limitation.** The public may insist on property being accepted for transportation by carriers without any limitation of their responsibility.
9. ———: **Reduced Rate: What is.** A "reduced rate" given by a carrier must be one fixed lower than another rate which is offered to the public, and the sale of a return trip ticket at a price less than two single trip fares is not a reduced rate.
10. ———: **Limiting Liability for Loss of Property: Statutes of California Construed: Consideration Necessary.** California Civil Code, section 2174, provides that the obligation of a carrier cannot be limited by general notice on his part, but may be limited by special contract; section 2175 provides that a carrier cannot be exonerated by any agreement, made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants; section 2176 provides that a passenger, by accepting a ticket or written contract for carriage with the knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated, and also the limitation stated therein upon the amount of the carrier's liability for trunks lost or injured, when the value of such property is not named, but his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same. *Held*, that an independent consideration for a limitation of the common law liability, such as a reduced rate of fare or freight, is essential; and, where a passenger bought a ticket in California to St. Louis and return, which limited the carrier's liability for loss of baggage, and the carrier did not have for sale an unrestricted liability ticket, so that the passenger had no choice of contracts, the ticket he bought was not sold at a reduced rate, so as to be consideration for limitation of liability, and upon loss of the baggage on the return trip he could recover therefor free from limitations.
11. ———: **Limiting Liability: Prerequisite to Validity of Limitation.** Though carriers may restrict their liability as insurers, such privilege is for the benefit of the public, as well as of carriers, and does not permit the carriers to impose conditions restricting liability, whether patrons desire such terms or not, but for such a limitation to be valid, the carrier must be willing to assume the full responsibility imposed by law, and must allow the owner the privilege of choosing between a restricted and full liability.
12. ———: ———: ———: **Acceptance of Ticket or Bill of Lading Without Protest.** Usually the acceptance, without protest, of a ticket or receipt for property, issued by a carrier and containing

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restrictions on the carrier's liability, will be treated as an assent by the patron to the terms of the receipt or ticket; and the carrier need not offer an option between the two classes of contracts, but it is sufficient if the patron could have had the unrestricted contract had he demanded it.

13. ———: **Loss of Baggage: Gross Negligence.** The misrouting of baggage by a carrier at a junction point is strong proof of gross negligence.
14. ———: **Baggage Defined.** "Baggage" means those articles of personal convenience and adornment usually taken by a passenger on a journey or a visit and suitable to his station in life and social standing.

Appeal from St. Louis City Circuit Court.—*Hon. Wm. M. Kinsey*, Judge.

**AFFIRMED.**

*Johnson, Rule & Allen* for appellant.

(1) The law of the State where the contract was made governs even though the contract is to be performed in another State. *Otis Co. v. Railroad*, 112 Mo. 662; *Reed v. Tel. Co.*, 135 Mo. 661; *Hartmann v. Railroad*, 39 Mo. App. 88; *Crouch v. Railroad*, 42 Mo. App. 248; *Nenno v. Railroad*, 105 Mo. App. 540; *Townsend and N. D. G. Co. v. Express Co.*, 133 Mo. App. 683.

(2) Under the law of California the contract entered into by plaintiff and defendant agreeing to a limitation of the carriers' liability to \$100 in case of loss of his trunk, was valid and enforceable. Sec. 2176, Civil Code of Cal.; Deposition of Henry E. Monroe, *abst.*, p. 31.

(3) Plaintiff must be presumed to have had actual knowledge of the contents of the contract which he signed. *Merrill v. Transfer Co.*, 131 Cal. 582.

*Matthew P. O'Reilly* for respondent.

(1) The law of the State where the contract is to be performed governs. *Machinery Co. v. Ramlose*,

210 Mo. 631. (2) (a) Even under the law of California the contract limiting the liability of a carrier must be a special one and supported by a special consideration. Sec. 2174, Civil Code Cal. (b) Such is the common law. *George v. Railroad*, 214 Mo. 551; *Ward v. Railroad*, 158 Mo. 234; *Creel v. Railroad*, 137 Mo. App. 27; *Ficklin v. Railroad*, 117 Mo. App. 221; *Phoenix P. Co. v. Railroad*, 101 Mo. App. 442; *Paddock v. Railroad*, 60 Mo. App. 328; *Conover v. Express Co.*, 40 Mo. App. 31; *Milling Co. v. Railroad*, 127 Mo. App. 80. (3) (a) Even under the law of California a carrier cannot contract to limit his liability so as to exempt it for losses caused by its negligence. Sec. 2175, Civil Code Cal.; *Merrill v. Transfer Co.*, 131 Cal. 582; *Michalitschke v. Wells Fargo*, 118 Cal. 683. (b) And such is the common law. *Witting v. Railroad*, 101 Mo. 634; *Anderson v. Railroad*, 93 Mo. App. 677; *Conover v. Express Co.*, 40 Mo. App. 31. (4) It was gross negligence for the defendant to deliver the trunk to any one else than the Santa Fe. *Lin v. Railroad*, 10 Mo. App. 125; 4 *Elliott, Railroads*, 2248; *Railroad v. Nicolai*, 4 Ind. App. 119; *Merrill v. Transfer Co.*, 131 Cal. 582; *Railroad v. Cole*, 68 Ga. 623; *Johnson v. Railroad*, 33 N. Y. 610; *Robertson v. Merchants Co.*, 45 Ia. 470; *Hinckley v. Railroad*, 56 N. Y. 429; *Railroad v. Allison*, 59 Tex. 193; *Independence Co. v. Railroad*, 72 Ia. 535; *Campion v. Railroad*, 43 Fed. 775; *Duncet v. Wade*, 3 Ill. 285; *Levi v. Railroad*, 35 La. Ann. 615; *Merrick v. Webster*, 3 Mich. 268; *Brown v. Railroad*, 63 Minn. 564. (5) A carrier may not violate the contract and at the same time claim the benefit of the contract. 4 *Elliott on Railroads*, 2248; *Hostetter v. Park*, 137 U. S. 30; *Estes v. Railroad*, 7 N. Y. Supp. 863. (6) Jewelry is baggage when carried for personal use or adornment on the trip or at the destination. Article by Mr. Lawson, 38 C. L. J. 5-6; *Macrow v. Railroad*, L. R., 6 Q. B. 612; *Railroad v. Fraloff*, 100 U. S. 24; *Mauritz v. Railroad*, 23 Fed. 765; *Pettigrew v. Barnum*, 11 Md. 434; *Coward*

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v. Railroad, 16 Lea 225; Railroad v. Carrow, 73 Ill. 348; McGill v. Roannd, 3 Pa. St. 451; Torpey v. Williams, 3 Daley 162; Brooks v. Pickwick, 4 Bing. 218; Keith v. Railroad, 2 Ohio Dec. 125; Merrell v. Grenell, 30 N. Y. 594; Jones v. Vorhees, 10 O. 145; McCormick v. Railroad, 4 Ed. Smith (N. Y.) 181; Contract Co. v. Cross, 8 Bush. 422; Railroad v. Hammond, 33 Ind. 379; Bruty v. Railroad, 32 Up. Can. (Q. B.) 66.

GOODE, J.—This plaintiff, a resident of San Francisco, California, purchased in that city from the Atchison, Topeka & Santa Fe Railroad Company, on September 10, 1904, a railroad ticket good for passage from there to St. Louis, Missouri, and return, over said railroad company's line between San Francisco and Kansas City, and over the Chicago & Alton railroad between Kansas City and St. Louis. He testified there was no attempt made when he bought the ticket to conceal from him any of the printed conditions. He reached St. Louis where he sojourned about six weeks and then started on his return trip, October 16th, having first had his ticket validated according to its terms at the Chicago & Alton Railroad Company's office in St. Louis. Plaintiff then took the ticket to the office of the St. Louis Transfer Company, a corporation engaged in hauling baggage from houses in St. Louis to the union station. The purpose of plaintiff was to have the transfer company check his trunk at the residence where he was stopping, through to San Francisco. He gave the company the railroad ticket and fifty cents to pay the charge for transferring baggage to the union station, the company sent a baggage wagon to the house where plaintiff was stopping, checked the trunk there and gave him a duplicate check. The evidence proves the transfer company gets the checks used by it from the railway companies running into St. Louis, including defendant, and issues the checks in accordance with the routing of the tickets held by the owners of baggage.

Plaintiff's trunk was checked and routed by the transfer company as agent of defendant, and this is not disputed. The check number on plaintiff's trunk was 142,736, as shown by papers taken from the files of the Terminal Railway Association of St. Louis, which contained a list of the items of baggage turned over to said association by the transfer company on October 15th. The check had printed on it a provision that "agents and baggagemen must enter on checks the name of issuing line, form number, complete route and junction points of ticket on which check was issued." It was the course of business of the transfer company to check baggage at residences and hotels, haul it to the union station and there turn it over to the Terminal Railway Association. The list of items aforesaid taken from the files of the Terminal Association contained, among others, this item referring to plaintiff's baggage:

"Destination.	Route.	Through Check Nos.	Claim Check Nos.	Street & No.	Amount to Collect.
* * *	* *	* *	* * *	* *	* *
San Francisco	C. & A.	142736		3224 Wash. A.	
* * *	* *	* *	* * *	* *	* * *

That notation meant the said railroad association had received a piece of baggage from the St. Louis Transfer Company, checked to San Francisco, that the check number was 142,736, and the letters "C. & A." indicated the routing; that is, the trunk was to go over the Chicago & Alton Railroad, and according to the course of business it was the duty of the Terminal Railroad Association to deliver the trunk to the Chicago & Alton Company. It should be remembered this trunk was checked by the St. Louis Transfer Company upon

plaintiff's ticket which had been turned over to said St. Louis Transfer Company, and purported to be issued by the Atchison, Topeka & Santa Fe Company for a trip between San Francisco and St. Louis and return, as heretofore stated. Plaintiff testified the part of the check issued to him, there being a part fastened to the trunk, showed the trunk was routed over the Atchison, Topeka & Santa Fe Railroad from Kansas City. When the trunk reached Kansas City, as it did in safety, instead of being turned over to the Atchison, Topeka & Santa Fe Company, it was placed on Union Pacific train No. 3, which train was bound for Denver, and the trunk was routed out of Denver on the Denver & Rio Grande railroad. It was afterward put on a train of the Southern Pacific Railroad Company and was burned in a wreck on that railroad at Yuba Pass. This action is to recover the value of the trunk and its contents, the total value being laid at \$1137.33. The contents are itemized and consist, besides suits of men's clothing, vests, hats, shoes, neckties, underwear, shirts, cuffs and collars, of the following articles which defendant asserts were not baggage:

"One gold match box with 1 1-2 carat diamond setting . . . . . \$260.00  
 One pink pearl in diamond setting . . . . . 150.00  
 One brown onyx ring with initial "R" . . . . . 14.00  
 One scarf pin of gold, a crab holding small diamond in claws . . . . . 38.00  
 One silver cross . . . . . 2.00  
 One silver watch charm . . . . . 6.00  
 One pr. gold cuff buttons with diamonds . . . . . 45.00  
 One plain gold match box . . . . . 20.00"

The petition charges in substance the delivery of the trunk and contents to the Chicago & Alton Railroad Company in St. Louis, the duty of said company to carry it safely and deliver to plaintiff at San Francisco; that in disregard of its duty as a common carrier, defendant had failed to do this, whereby plaintiff was

damaged in the sum aforesaid. The eighth paragraph of the ticket reads:

"The purchaser agrees that the value of baggage offered for carriage does not exceed \$100; and in case of loss of, or damage to, the same from any cause, the carrier shall not be liable for a greater amount."

"I hereby agree to all conditions of the above contract.

"(Signed)

DENT H. ROBERT, Passenger."

It will be perceived plaintiff subscribed his name below said paragraph of the ticket. He testified he was hurrying to St. Louis on account of illness in the family and so he asked for a round trip ticket on the train known as the California Limited, requesting the agent to sell him a ticket over the lines of railway companies which made the quickest trip between San Francisco and St. Louis, stating his reason; the ticket was given him to sign and he signed it; he did not remember whether he asked the price of it; the man in charge of the office handed him pen and ink and the ticket and indicated or told him where to sign it. Plaintiff made this further statement: "I signed it because I could not purchase it otherwise." The Assistant General Passenger Agent at San Francisco of the Atchison, Topeka & Santa Fe Railroad Company, on September 10, 1904, when the ticket was purchased, testified \$102 was paid for it, which was the fare from San Francisco to St. Louis and return, over the road of said company to Kansas City and thence over the Chicago & Alton Railroad to St. Louis, the one way fare was \$67.50, the reduction being made on account of the purchase of a round trip ticket. This witness said it was customary for the Santa Fe Company to give a reduction for an excursion or round trip ticket; that on the California Limited only first-class tickets were accepted; the one sold to plaintiff was not the only ticket accepted on that train, but any ticket marked "first-class" was ac-



cepted if it was punched to indicate first class. Defendant introduced the following sections from the Civil Code of California:

"Section 2176. Effect of written contract.—A passenger, consignor or consignee, by accepting a ticket, bill of lading or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated, and also the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks or boxes, is lost or injured, when the value of such property is not named; and also to the limitation stated therein to the carrier's liability for loss or injury to live animals carried. But his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same."

Defendant put in also the testimony of an attorney in San Francisco, which was, in effect, that paragraph eight of the ticket, limiting the amount to be recovered for loss of baggage, was enforceable in California "as a fair, just and reasonable provision. In rebuttal, plaintiff offered the following sections from the Civil Code of California:

"Section 2174. Obligation of Carrier Altered Only by Agreement.—The obligation of a common carrier cannot be limited by general notice on his part, but may be limited by special contract. En. March 18, 1872. Am'd 1873-4, 249.

"Section 2175. Certain Agreements Void. A common carrier cannot be exonerated by any agreement made in anticipation thereof from liability for the gross negligence, fraud, or wilful wrong of himself or his servants. En. March 21, 1872."

Plaintiff also put in evidence the opinions of the Supreme Court of California in *Michalitschke v. Wells Fargo Ex. Co.*, 118 Calif. 683 and *Merrill v. Pac. Transfer Co.*, 131 Calif. 582. Two of the main instructions

granted at the instance of plaintiff held defendant liable for the full value of the trunk and its contents, if defendant carried the trunk to Kansas City and there delivered it to some other person or corporation than the Santa Fe Company, provided the jury found plaintiff paid the highest price for his ticket for which similar tickets were sold to the public at the time of the purchase between San Francisco and St. Louis and return. The second of those instructions declared if the jury believed the ticket was the highest priced ticket sold by the Atchison, Topeka & Santa Fe Railroad Company to the public at the date of sale over its railroad from San Francisco to St. Louis and return, "then the stipulations contained in said ticket, if any, limiting the amount of the value of baggage and also the liability of defendant company for loss or damage to same to one hundred dollars, is void." This instruction was granted at plaintiff's instance:

"If the jury believe from the evidence that the defendant, Atchison, Topeka & Santa Fe Railway Company, would not sell to the plaintiff a ticket from San Francisco, California, to St. Louis, Missouri, and return, unless he signed the ticket and required the plaintiff to sign the same before it would sell it to him, and that said ticket was the highest priced ticket sold to the public between the cities named, and return, then by signing the said ticket the plaintiff did not assent to its terms and all stipulations limiting the liability of the railroad company as to the value of the baggage therein, are void."

The main instruction granted at defendant's request declared, in effect, if defendant safely transported the trunk and contents from St. Louis to Kansas City and there safely delivered the same to the connecting carrier named in the ticket, or said carrier's agent, and the trunk was not lost, damaged or destroyed while under its control, the verdict must be for defendant. The issue of whether defendant delivered the trunk to

the Santa Fe Company as the ticket required, was submitted to the jury, and as the jury found it was not and the evidence permitted no other finding, we will say nothing more about that matter. The jury were advised a passenger over any railroad was entitled to carry with him his baggage, which meant those articles of personal comfort, convenience and adornment usually taken by a traveler on a journey or visit; unless they found from the evidence the articles of jewelry found to have been contained in plaintiff's trunk were articles of comfort, convenience and adornment such as were usually carried by a person in plaintiff's station in life and social standing, he could not recover for those articles. At defendant's request the jury were told there was no evidence defendant was guilty of "gross negligence, fraud or wilful wrong." Of its own motion the court granted an instruction which made the agreement as to value binding if the jury found a reduced rate was charged for plaintiff's passage and plaintiff knew, or had opportunity to know, of the restriction when he signed the ticket, and if the jury found that under the law of California such a limitation was enforceable. Certain requests of defendant were refused. Two were, in substance, that unless the jury believed the trunk and contents were lost while under the control of defendant, the verdict must be in its favor. Two others were predicated on the theory that if the rate of fare charged plaintiff for a round-trip ticket was less than double the one-way fare between San Francisco and St. Louis, the ticket was issued to plaintiff at a reduced rate of fare, and the agreement in it regarding the valuation to be put on his baggage in case of its destruction or loss was a valid contract under the law of California. Defendant likewise requested an instruction which the court refused, advising the jury they could not return a verdict against defendant in any sum greater than one hundred dollars in case the findings were for plaintiff. That request was, in effect, one for a verdict in

favor of defendant. Exceptions were saved to adverse rulings on the requests for instructions. The verdict returned was for \$1023.60 in favor of plaintiff, and judgment having been entered accordingly, defendant appealed.

The question for first solution is what law should control our decision, plaintiff contending we should follow the law of Missouri as the place of performance contemplated by the parties, whereas defendant insists the law of California where the contract was made, should govern. The contract of carriage was to be performed in part in Missouri, but also in California and the states between those two through which plaintiff would travel in going from San Francisco to St. Louis and return. It must be remembered plaintiff was a citizen of California and had started with his baggage on the return trip from St. Louis to San Francisco; further, the gravamen of the petition is that he had tendered said ticket to defendant, the latter had accepted plaintiff's baggage pursuant to the contract (*i. e.* the ticket) and it became the duty of defendant to carry the baggage from St. Louis to San Francisco and there deliver the same to plaintiff; but in violation of its duty, defendant had failed to deliver the baggage to plaintiff, though often requested to do so. As the case is thus stated, the place of complete performance of the contract between the parties, was the place where the trunk was to be delivered by defendant to plaintiff, or San Francisco; and having regard to all the facts, it is impossible to hold Missouri was contemplated by the parties, including the Santa Fe Company which sold the ticket, as the place where the contract was to be performed. But if it was, the great weight of authority favors the rule that such a contract is governed by the law of the place where it was made; a rule which has been declared in several decisions of the appellate tribunals of this State. [*Otis v. Railroad*, 112 Mo. 622, 20 S. W. 676; *Goldsmith v. Railroad*, 12 Mo. App. 479; *Townsend*, etc.,

Co. v. Express Co., 133 Mo. App. 683, 113 S. W. 1161; 1 Hutchinson, Carriers (M. & D. Ed.), sec. 215 *et seq.*] We hold the law of the case must be found in pertinent statutes and decisions of the state of California, if such there are, unless their authority should be repudiated because repugnant to the law and policy of this State, or as not affecting the contract in question, which was one for interstate carriage and subject to regulation by Congress. Congress has enacted no law to prohibit agreements regarding the value of property offered to railway companies or other common carriers for interstate shipment and limiting the amount for which they will be liable if the property is lost while in their custody. We find no provision to that effect in the original Interstate Commerce Act or in any amendment of it; but in *Ward v. Railroad*, 158 Mo. 226, 58 S. W. 28, it was held said act prevented a reduced rate of freight being made to the consignor for such a valuation, a conclusion we cannot reconcile with the opinion of the Interstate Commerce Commission pronounced in *In re Reduced Rates*, 13 I. C. C. 550, or with the opinion of the Supreme Court of the United States in *Cau v. Railroad Co.*, 194 U. S. 427. The national courts have sanctioned agreements between a carrier and an owner of property limiting the amount the former shall answer for in damages as the value of the property received for carriage, if lost during transit, provided the agreement as to value and limitation of liability is just, reasonable, fairly entered into by the owner, and for a reduced rate or other consideration moving him to consent to a restriction of the responsibility of the carrier as an insurer. [*Hart v. Railroad*, 112 U. S. 131; *Cau v. Railroad*, *supra*.] And those courts enforce state statutes regulating limitations of the liability of carriers for interstate shipments, in the absence of legislation on the subject by Congress. [*Solan v. Railroad*, 169 U. S. 133; *Penn.*, etc., *R. R. v. Hughes*, 191 U. S. 477.] Such a stipulation contained in a ticket or bill of lading issued

in this State, is enforced by our courts, if it is agreed to by the property-owner advisedly and with a free choice between the restricted agreement and the alternative right accorded him by the carrier to have his property carried under an unrestricted one; provided a reduced rate is allowed him, or some other advantage by way of consideration not conceded to patrons when the valuation of the shipment is not stipulated. [Kellerman v. Railroad, 136 Mo. 177, 37 S. W. 828; Harvey v. Railroad, 74 Mo. 538.] The doctrine of the Missouri courts and we think of the Federal courts requires the stipulation to be supported by an independent consideration, which is usually, or invariably, a lower fare or freight rate than the carrier charges for the same transportation under ordinary liability. The difference between the two groups of tribunals seems to be that those of Missouri impose the burden of proving a consideration on the carrier, whereas the Federal courts impose it on the shipper, presuming in favor of a consideration. [Kellerman v. Railroad, 68 Mo. App. 255, 136 Mo. 177; York v. Railroad, 3 Wall. 107; Cau v. Railroad, *supra*.]

The next inquiry is whether the law of California is in accord with our law on the subject; an inquiry to be answered from sections 2174, 2175 and 2176 of the Civil Code of California and the decisions of its Supreme Court expounding them, so far as this has been done. Said sections relate to the same subject-matter and should be construed together, in fact, have been by the Supreme Court of the State. [Michalitschke v. Express Co., *supra*.] Regarded with reference to the case in hand, section 2176 says a passenger who accepts a ticket for carriage with knowledge of its terms, assents "to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks and boxes is lost or injured, when the value of such property is not named." It will be perceived the statutes of California authorize agreements limiting liability for damage to property in transit caused

by the negligence of carriers, which agreements the courts of this State annul. A stipulation of value contained in a ticket or bill of lading, if reasonable and made under proper conditions by the passenger or shipper, is regarded here, not as a restriction of the carrier's responsibility for negligence, but as a liquidation of the damages recoverable in the event the property is lost or damaged in any manner for which the carrier is answerable. [Harvey and Kellerman cases, *supra*.] And this is the theory of the Federal courts also. [Hart v. Railroad, *supra*.] But by force of the statutory authority conferred on carriers to contract against the consequences of their negligence, unless it is gross, the Supreme Court of California has enforced stipulations of value in cases where it appeared damage might have occurred from the carrier's neglect; and the distinction between ordinary and gross negligence, was maintained. [Opinion of TEMPLE, J., in Michalitschke case.] Section 2176 does not expressly exact a consideration for an agreement as to the value of baggage, independent of the ticket issued to the traveler, but section 2174 says restriction of the liability of a carrier must be by "special contract." The point to be examined is whether those words and the three sections read as a whole, imply that an independent consideration, like a reduced rate of fare or freight, is essential to the validity of such an agreement; or whether it is enough that a patron is accorded passage even if it appears the price charged was the usual one and that there was no other form of contract available to him. We coincide with the view of counsel for defendant that the purpose of the words "special contract," was to signify no restriction of liability could be imposed on the public by the carrier giving notice it would not accept business under full responsibility, as once might be done in England. Nevertheless we think an independent consideration for a limitation of the common law liability was contemplated by the Legislature. It is the law everywhere in this coun-

try, we believe, that the public always has the right to insist on property being accepted for transportation by common carriers without any limitation of their responsibility. Indeed, the alternative of an unrestricted ticket or bill of lading must be accorded as one condition of a valid limited contract. [Cases *infra*. See, too, *The Kensington*, 183 U. S. 277.] This being true it is not reasonable to think the Legislature of California meant merely to legalize the gratuitous waiver by property-owners of the responsibility of a carrier, since it is improbable a waiver would ever occur without some inducement for it; and especially would liability for ordinary negligence not be waived gratuitously. The sections *supra* of the California Code have not been construed by the Supreme Court of the state with reference to the immediate point. In *Michalitschke v. Express Co.*, the answer averred a reduced freight rate, but in the opinion nothing was said of the averment. The controlling opinion was delivered by TEMPLE, J., and concurred in by the third judge of the Department of the Supreme Court which determined the case. The action was for the value of packages of cigars lost in transit between New York and San Francisco, for which a bill of lading or receipt had been issued by the defendants, stipulating against liability for loss or damage to an amount in excess of \$50, unless the value of the shipment was stated in the receipt. No value was stated, and in the answer defendants set up the receipt with its terms of limitation, alleged the plaintiffs had full knowledge of the terms at the time they accepted the receipt, that a reduced rate of transportation was paid, and the regular rate would have been charged if defendants had known the value of the package was \$625. The Supreme Court said the plaintiffs could recover the full value of the cigars, provided they proved the loss was due to the gross negligence of the defendants, and held the Civil Code authorized a carrier to limit its liability for packages the value of which was not stated, except



when the loss resulted from gross negligence or wilful wrong. In *Merrill v. Transfer Co.*, 131 Cal. 582, the plaintiff sued as assignee of his wife to recover damages for the defendant's failure to deliver a trunk belonging to the wife at plaintiff's residence in San Francisco. The receipt issued by the Transfer Company for the trunk contained printed terms which said the company would not be liable for the loss of money, merchandise or jewelry contained in baggage in any event, or for any trunk and contents in a sum exceeding one hundred dollars, or for any valise and contents in a sum exceeding twenty-five dollars, unless specially agreed in writing. The plaintiff did not read the receipt when it was issued, but he was familiar with the methods of business of the company, and there was light enough for him to read. The question in the case was whether the plaintiff had notice of the terms of the receipt under section 2176 of the Civil Code, which made such a receipt effective if accepted "with knowledge of its terms." It was said opportunity to know the terms, or knowledge of facts to put one on inquiry, was notice of them. Merrill paid the Transfer Company for the service it was to render, "the price usually charged, which was fifty cents for each trunk;" but this matter was not involved in the decision nor adverted to in the opinion. The restriction was held good under section 2176 of the Civil Code, the Transfer Company exonerated unless the loss of the trunk could be proved to have been caused by its gross negligence, and whether or not this was true was held to be a question for the jury. Though the opinion deals mostly with the question of whether the plaintiff had notice of the terms of the receipt, in discussing that question the validity of the stipulation was incidentally touched upon. The court remarked not only upon the plaintiff's opportunity to read the receipt, but upon his having paid the usual price charged for the service rendered by the company. As to the latter circumstance a pas-

sage from the opinion of the Supreme Court of New York, delivered on similar facts, in *Kirkland v. Dinsmore*, 62 N. Y. 171, was quoted wherein the New York court said if that plaintiff had objected at the time the receipt for his baggage was issued, "the defendant would have been entitled to exact as a condition of carrying the parcel, compensation equivalent to the risk of insuring it." If the statutes of California are held to require a consideration for an agreed valuation of property, the law there will accord with the law elsewhere. We pronounce on this point with diffidence in the absence of more light from the Supreme Court of California.

Turning now to the facts of the present controversy in order to determine their effect under the law as we have ascertained it, we observe that it is to be borne in mind no consideration for the stipulation as to the value of plaintiff's baggage, other than a reduced fare, was contended for by defendant, and whether a lower fare was charged was an issue on which both parties introduced evidence instead of invoking a presumption. The defendant now insists the evidence established its contention, as it proved the price of a round-trip ticket was less than the sum of the prices of a going and return ticket. We deem this position untenable. The Interstate Commerce Act required the two railway companies plaintiff dealt with to prescribe schedules of regular rates for the different services they stood ready to render. [Act, section 6.] Defendant not only failed to prove those companies had fixed a rate for an unlimited ticket or offered such for sale; but in our judgment the contrary was conclusively shown and defendant cannot be heard to claim, in the face of the evidence on the issue, that the fare charged plaintiff was reduced, on the theory that he would have been sold an unrestricted ticket at a higher price had he demanded one. A "reduced rate" must be one fixed lower than another rate which is offered to the public; and that no higher rate was pre-

scribed by the Atchison, Topeka & Santa Fe Railway Company and defendant, appears beyond doubt, if we reject the theory that the round-trip fare was a "reduced rate" because less than two single-trip fares. [Duvenack v. Railroad, 57 Mo. App. 550.] The leading Federal case (Hart v. Railroad, 112 U. S. 331) is in accord with the view that a reduced rate or other consideration must be given to support a limited liability contract of affreightment; and we think the United States Supreme Court has not rejected the rule therein declared, though *Cau v. Railroad* excites a doubt as to whether the rule now is that no independent consideration for a restrictive stipulation is required or merely that the rate will be presumed to be reduced if such a stipulation is inserted in a bill of lading, unless the contrary is shown by the party contesting the validity of the restriction. See, too, *York Co. v. Railroad*, 3 Wall. 107. Whatever the Federal doctrine on this point may be, under the decisions in this State it is clear there was no consideration for the limitation of liability in the present case, and those decisions ought to govern us, if the question is an open one under the California decisions and not regulated by an Act of Congress. [Flato v. Mulhall, 72 Mo. 522; Philpott v. Railroad, 85 Mo. 164; Johnston v. Gawtry, 11 Mo. App. 322, 83 Mo. 339.]

In the third instruction granted at plaintiff's request, the jury were advised that plaintiff did not assent to the restrictive stipulation in his ticket if it was the highest priced ticket sold to the public between San Francisco and St. Louis and return, and if the jury found from the evidence the Atchison, Topeka & Santa Fe Company would not sell plaintiff the ticket unless he signed it. The theory of this instruction doubtless was that by requiring plaintiff to sign the ticket before it would be issued to him, he was, perhaps, laid under compulsion to assent to the conditions of the ticket and this compulsion rendered the stipulation null. As said *supra*, though carriers are allowed to restrict their lia-

bility as insurers, this liberty has been conceded for the benefit of the public as well as of carriers, and does not embrace the right on the part of the latter to impose conditions restricting liability whether patrons desire such terms or not. For the limitation to be valid the carrier must be willing to assume in transporting the proffered property, the full responsibility the law imposed, and must allow the owner the privilege of choosing between a restricted and full liability. [1 Hutchinson, Carriers, sec. 404; McMillan v. Railroad, 16 Mich. 79; Little Rock, etc., v. Cravens (Ark.), 18 L. R. A. 527; Deming v. Railroad (Tenn.), 13 L. R. A. 518; Railroad v. Gilbert, 88 Tenn. 430, 12 S. W. 1018.] Usually the acceptance without protest of a ticket or receipt for property issued by a carrier and containing restrictions on the latter's liability, will be treated as an assent by the owner to the terms of the receipt or ticket. It is not necessary for the carrier to offer the property-owner the option between the two classes of contracts, but it is sufficient if he could have had the unrestricted contract had he demanded it. [Railroad v. Stone, 112 Tenn. 248, 79 S. W. 1031; Arthur v. Railroad, 139 Fed. 127; Akin v. Railroad, 80 Mo. App. 8.] As regards the present case this point is covered by the treatment of the previous one, and for two reasons: First, the evidence showed conclusively defendant did not sell an unrestricted liability ticket, and plaintiff had to accept the one he bought or go by some other route or some other train; second, the third instruction did not invalidate the stipulation as to the value of plaintiff's baggage unless the jury found, not only that he was required to sign the stipulation, but also that the ticket sold was the highest priced ticket for transportation between San Francisco and St. Louis and return. Hence the instruction simply added to the burden of proof imposed on plaintiff in the first and second instructions, the burden of proving another fact in order to recover.

In our opinion there was evidence tending to show the loss of the trunk occurred by defendant's gross negligence; an observation we make lest we be thought to indorse the view of the court below on the question. The misrouting of it at Kansas City is, to our minds, strong proof of gross negligence, and it is doubtful if it did not lay defendant liable despite the restriction.

The instructions as to what constitute baggage are approved. [Hubbard v. Railroad.] Those instructions are not challenged by defendant, but it is said the evidence of plaintiff's social position was insufficient to warrant a finding that the jewelry lost by him was such as a man in his position might carry as baggage. This assignment is without merit, we think.

The judgment is affirmed. All concur.

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**SARAH FLEISHMAN, Respondent, v. POLAR WAVE  
ICE AND FUEL COMPANY, Appellant.**

St. Louis Court of Appeals, April 19, 1910.

1. **NEGLIGENCE: Runaway Horses: Inferring Negligence: Evidence.** Most decisions sustain the doctrine that negligence can not be inferred merely from the fact a team or horse ran away and caused damage, since runaways occur from the fright of horses, when those in charge of them are not at fault.
2. **——: Personal Injuries: Negligent Driving: Sufficiency of Evidence.** Where a driver drove his wagon against another wagon which was standing on the street, causing the tongue of the latter to swing around and strike a pedestrian, the accident happening in daylight and there being ample room in the street for a team and wagon to pass the standing wagon without striking it, the conclusion the driver was negligent is nearly irresistible.
3. **——: Inferring: Not Necessary to Exclude All Other Causes of Injury.** It is not the rule that negligence can be inferred as the cause of an accident from the facts of the occur-

*Fleishman v. Ice and Fuel Co.*

rence only when all other possible causes are excluded, for it is conceivable in practically every instance the accident might, within the range of possibility, have been due to something else.

4. ———: ——— *Res Ipsa Loquitur*. If the instrumentality that did the damage was under the management of a person and the accident was such as does not happen in the ordinary course of events, when the instrumentality which caused it is handled with due care, an inference of negligence may be drawn from the testimony.
5. ———: *Personal Injuries: Negligent Driving: Evidence: Physical Facts*. In an action for personal injuries, plaintiff's evidence tended to prove that a wagon, standing on the east side of a street, with the tongue rigid and pointing northward, was struck by a north-bound wagon, causing the tongue of the standing wagon to swing around and strike plaintiff, who was walking north on the east side of said street, on her right side. *Held*, this was by no means an impossible accident and though plaintiff testified the tongue hit her on the right side as it swung from the left, it may have happened she was facing obliquely at the moment, so that her right side was the more exposed to a blow.
6. ———: ———: ———: ———: *Ownership: Name on Wagon*. Evidence that defendant's name was on the wagon which collided with the standing wagon was competent to show that such wagon was in charge of defendant's servants, and that they were acting in the course of their employment at the time.
7. ———: ———: ———: ———: ———. Perhaps proof of the name on the wagon alone would carry the case to the jury on the issue of defendant's liability.
8. ———: ———: ———: ———: ———: *Authority of Servants: Evidence Held Sufficient: Facts Stated*. In addition to proving that defendant's name was on the wagon which collided with the standing wagon, it was proved it was similar to many wagons used by defendant and used in its business and seen in its yard in the immediate vicinity of the accident; that the wagon was coming from the direction of said yard at the time; that no other concern used similar wagons. Defendant offered no evidence to prove the wagon did not belong to it, was not in charge of its servants, or, if it was, that the servants were not in the performance of a task for defendant at the time, but engaged upon some purpose of their own. Defendant sent a physician to examine plaintiff and ascertain the extent of her injuries. *Held*, the evidence was sufficient to establish prima facie that the wagon which caused plaintiff's injury was owned by defendant, was in charge of its servants, and they were engaged in its service when the collision occurred.

9. ———: ———: ———: ———: ———: ———: Instructions. In an action for personal injuries through the negligent driving of defendant's wagon, an instruction requiring the jury to find only that the wagon was in charge of defendant's servants, and omitting to require a finding that they were engaged at the time in the course of their employment, was erroneous; plaintiff's evidence on the latter point not being sufficient to permit more than inferences.
10. ———: ———: ———: ———: ———: ———: Inferences for Jury. In an action for personal injuries, where the questions of the defendant's ownership causing the injury and its responsibility for the servant in charge of it are contested issues of fact, and the evidence for the plaintiff is only sufficient to permit inferences by the jury, the defendant is entitled to have the jury weigh such evidence and find from it what they deem were the probable facts.
11. ———: ———: ———: ———: ———: ———: ———. While it is true the courts have held defendants in like cases are called on to exonerate themselves by testimony to show the culpable persons were not their employees, or were not in their line of duty, and have said those facts would be presumed, what is meant is, that it is incumbent on a defendant to show those facts in defense, after the plaintiff has shown *prima facie* to the contrary, and the word "presumed" is used in the sense of "inferred" and does not signify the inference was compulsory, but that it might be made by the jury.

Appeal from St. Louis City Circuit Court.—*Hon. Robert M. Foster*, Judge.

REVERSED AND REMANDED.

*Watts, Williams & Dines* and *Wm. R. Gentry* for appellant.

(1) The demurrer to the evidence should have been sustained: (a) Because there was no evidence whatever of any negligence on the part of the defendant, or anybody else, contributing to the plaintiff's alleged injuries. The doctrine of *res ipsa loquitur* does not apply here; negligence cannot be inferred from the mere striking of one wagon by the other. Some negligent act on the part of defendant must be proven. *Schmidt v. Hark-*

ness, 3 Mo. App. 585; Cotton v. Wood, 8 C. B. (N. S.) 568; Same case, Thompson on Neg. (1 Ed.), p. 364; Lane v. Crombie, 12 Pick. (Mass.) 415; Same case, Thompson on Neg. (1 Ed.), p. 376; Schmidt v. Railroad, 149 Mo. 269; Dowell v. Guthrie, 99 Mo. 653; Bigelow v. Reid, 51 Me. 325; Lane v. Crombie, 29 Mass. 177; Lee v. Jones, 181 Mo. 291; Waters v. Wing, 59 Pa. (9 P. F. Smith) 211; Herschberger v. Lynch, 11 Atl. 642; Parsons v. Yeager Milling Co., 7 Mo. App. 594; O'Malley v. Railroad, 113 Mo. 320; Garlick v. Dorsey, 48 Atl. 220; O'Brien v. Miller, 60 Conn. 214; Bennett v. Ford, 47 Ind. 264; Shawhan v. Clarke, 24 La. 390; Broult v. Hanson, 158 Mass. 17; Kenney v. Way, Brightly, N. P. 186; Britton v. Frick, 51 Conn. 342; Gray v. Thompson, 15 N. Y. Supp. 453; Goransson v. Mfg. Co., 186 Mo. 300; Epperson v. Telegraph Co., 155 Mo. 346. (b) The demurrer to the evidence should have been sustained because there was no evidence offered by plaintiff proving, or tending to prove, that the wagon designated by her as the "Polar Wave" wagon was operated by the defendant, through a servant acting in the line of his employment as a servant of the defendant. Without such proof the plaintiff's case ought not to have gone to the jury. Frisby v. Transit Co., 113 S. W. 1059 and cases cited; Evans v. Automobile Co., 121 Mo. App. 266; Cousins v. Railroad, 66 Mo. 576; Brenner v. Ford, 116 La. 550; Fiske v. Enders, 73 Conn. 338; Fish v. Coolidge, 47 App. Div. 149; McCartney v. Timmins, 178 Mass. 378; Thorp v. Miner, 109 N. C. 152; Goodman v. Kennell, 3 Cor. & P. 168; Reaume v. Newcomb, 124 Mich. 137; Perlstein v. Am. Exp. Co., 177 Mass. 530; Stone v. Hill, 45 Conn. 44; Patterson v. Kates, 152 Fed. 481; Slater v. Adv. Thresher Co., 97 Minn. 305; Lotz v. Hanlon (Pa.), 66 Atl. 525; McMullen v. Hoyt, 2 Daily at p. 277. (c) The demurrer to the evidence should have been sustained because the plaintiff's account of the manner in which she was injured was so absolutely contrary to physical facts that it was not sufficient to entitle her to have her



case submitted to the jury. When that is true, the case should be taken from the jury. *DeMaett v. Fidelity & Casualty Co.*, 121 Mo. App. 92; *Schaub v. Railroad*, 113 S. W. Rep. 1163. (2) The court erred in admitting evidence as to the wording on the wagon which struck Moll Grocery Company's wagon. This evidence was purely hearsay and did not tend to establish the operation of the wagon. (3) The court erred in giving instruction numbered 1, at the request of the plaintiff, because said instruction permits the plaintiff to recover regardless of whether the man driving the wagon was acting in the line of his duty for the defendant or not.

*J. F. Coyle and Morrow & Kelley* for respondent.

GOODE, J.—This plaintiff dwells on the east side of Eleventh street, between Wash street on the south and Carr street on the north, her residence being No. 1006 North Eleventh. Defendant, a corporation engaged in the ice and fuel business, maintains a yard and place of business at the corner of Eleventh and Wash streets and, we gather from the record, almost immediately opposite the home of plaintiff. The Moll Grocer Company has a stable for horses and teams at No. 1020 North Eleventh street, on the same side as plaintiff's residence and a few doors north. Plaintiff received an injury in front of the Moll stable about noon on January 21, 1908, and in this manner: A two-horse wagon belonging to the Moll Company stood in front of their stable near the curb with the tongue rigid and pointing northward. The horses had been unhitched and taken into the stable to be fed. Plaintiff started from her home to go to a butcher shop, walking north along the sidewalk on the east side of Eleventh street and while she was passing the wagon standing in front of the Moll stable, a wagon and team came along from the south in the street, and the wagon was so driven that its wheels

collided with the rear wheels of the Moll wagon and jostled the latter so violently its tongue was thrown around across the sidewalk and fastened under the door of the Moll stable. As the tongue swung around it struck plaintiff in the right side, knocking her into unconsciousness so she fell to the sidewalk and lay there until her father, who lived just across the street from the Moll stable and had witnessed the accident, without knowing who was hurt, came across, discovered plaintiff lying there, and with the aid of another man carried her to his residence where she was put to bed. Her injuries were serious but need not be described as there is no contention about their nature or complaint that the verdict is excessive. The testimony tends to prove two negro men were in the wagon, which collided with the stationary wagon, and the moving wagon was loaded either with manure or cinders. After the collision it was driven rapidly away to the north. It was a large yellow vehicle, without a top, with sideboards, with the words "Polar Wave Ice Company" painted on it, and drawn by a team of gray horses. There is abundant evidence in the record to show it was like wagons in use by defendant company and kept in its yard in the vicinity. Plaintiff testified she had been taking ice from defendant for a long time and knew it used wagons like the one in question; further, that no one else used that kind of a wagon. Plaintiff's father testified he was standing in his door immediately opposite the Moll stable when he "heard some wagon give a great big knock against another wagon" and saw somebody fall. After the wagon passed he went over and was surprised to see his daughter lying on the sidewalk. As soon as she had been taken across into his store, he started to stop the drivers but they had gone. This witness testified he had lived in the neighborhood for eight years and knew defendant had many wagons like the one which collided with the Moll wagon. He testified further he saw the big yellow wagon trying to pull away from the station-

ary one after he heard the noise of the collision. Three men who were eating their dinner in the second story of the Moll stable, testified they heard the collision, raised a window, looked out and saw the wagon with defendant's name on it driving away; also heard the pole of the stationary wagon strike against the door of the stable, and when they went down found the pole wedged under the door so tightly it had to be prized out with a crowbar. These witnesses did not see a woman lying on the sidewalk, nor did they see one carried across the street by two men; however one of them testified that when they got down stairs they could not get the door open and had to go around through the back door, and one testified he could not see the sidewalk from the window. One or two of these witnesses testified plaintiff's father came across the street while they were endeavoring to get the tongue from under the door, but said nothing about his daughter having been hurt. Another witness said he saw the father across the street in his store, but he did not come over to the Moll stable or that side of the street. A physician was put on the stand by defendant and testified about plaintiff's injuries, and it was admitted defendant had sent him to examine plaintiff a little more than a week after the accident, and without any proof being put in of whether or not she had made claim against defendant. At the instance of plaintiff the court instructed the jury, in effect, that if they found plaintiff was walking north on the sidewalk on the east side of Eleventh street and a wagon was standing at the time in said street near the sidewalk where plaintiff was walking, and further found one of defendant's servants and employees in charge of and driving its wagon north on said street, negligently drove and ran the wagon into and against the wagon standing in the street, and thereby and by reason of said negligence caused the pole or tongue of the stationary wagon to strike plaintiff and injure her, they should find the issues for the plaintiff. The court further instructed as

to the meaning of "ordinary care" and measure of damages. Defendant requested no instructions except one regarding the right of the jury to disregard the testimony of any witness they might believe had sworn falsely to a material fact, and another informing the jury they could not take into consideration the circumstance that the words "Polar Wave Ice Company" were on the wagon which collided with the Moll wagon, as proof of who owned the wagon bearing the words. The latter instruction was refused and the record is silent as to whether the first one was given or not. The jury returned a verdict in favor of plaintiff for three thousand, five hundred dollars and defendant appealed.

First, it is contended the court should have directed a verdict for defendant because there was no evidence tending to show the collision was due to the negligence of the persons in charge of the moving wagon. It is argued negligence cannot be inferred merely from the fact that one wagon collided with another in the street, and in support of this proposition many cases have been cited, but we think they are not in point. They either assert the general doctrine that the party alleging negligence must prove it, or, in so far as they are analogous to the present case, deal with accidents due to runaway teams or collisions where both vehicles were moving toward each other on a thoroughfare. Most decisions sustain the proposition that negligence cannot be inferred merely from the fact a team or horse ran away and caused damage, because runaways occur from the fright of horses when those in charge of them are not at fault but in the exercise of reasonable care. [O'Brien v. Miller, 60 Conn. 214; Bennett v. Ford, 47 Ind. 264; Shawhan v. Clark, 24 La. 390; Brout v. Hanson, 158 Mass. 17; Britton v. Frick, 51 Conn. 342; Gray v. Thompson, 15 N. Y. Supp. 453.] In our judgment the conclusion the team in question was driven negligently is nearly irresistible from the facts before us. The Moll wagon was standing by the curb and the street was of

ample width for a team and vehicle to pass it, yet the parties in charge of the colliding wagon ran into it in daylight with great violence and then hurriedly drove on. None of the witnesses received the impression the team was running away and there is no evidence to prove it was. It is argued the horses may have become suddenly frightened at some object in the street and have swerved out of their course without the driver being able to control them; the Moll wagon may have been standing where the street was not level and the jolting of the moving wagon may have caused it to roll down the incline, thereby producing the collision; dust may have blown into the eyes of the driver of the moving wagon so he could not see to guide his horses. We do not understand the rule to be that the negligence of a defendant can be inferred as the cause of an accident from the facts of the occurrence only when all other possible causes are excluded. It is conceivable in practically every instance the accident might, within the range of possibility, have been due to something else. If the instrumentality which did the damage was under the management of a person, and the accident was such as does not happen in the ordinary course of events if the instrumentality which caused it is handled with due care, the inference of negligence may be drawn from the testimony. [Dougherty v. Railroad, 81 Mo. 325; Shuler v. Railroad, 87 Mo. App. 623; 2 Cooley, Torts (4 Ed.), 1424.] Answering the argument of counsel for defendant, we remark that a sudden swerve by the team so as to bring the wagon they were pulling into collision with the standing wagon, would not have been apt to swing the rear of the latter wagon around so as to throw its tongue across the sidewalk. To accomplish this result required a northward impulse of so great force as hardly could have been imparted in the swing of the moving wagon out of its route; whereas it could have been by the right wheels of said wagon catching the left rear wheels of the standing one. That the street

might have been inclined toward the middle instead of from the middle toward the curb or gutter, is highly improbable, and it is equally improbable the driver was so blinded by dust as to cause him not to see objects ahead of him; but the circumstances of the collision indicated careless driving with sufficient cogency to make a prima-facie case and require counter evidence to show the driver of the team was without fault.

Neither do we accept the contention that the physical facts prove plaintiff could not have been struck and hurt by the tongue of the stationary wagon. This was by no means an impossible incident, and though she testified the tongue hit her on the right side as it swung around from the left, it may have happened she was facing obliquely at the moment and so her right side was inclined slightly west of north, thereby exposing it to a blow from the tongue more than her breast or left side was exposed.

Counsel for defendant assert no case was made by plaintiff because she offered no proof the wagon and team belonged to defendant or was in charge of its servants or, if those two facts were established, that the servants were acting in the scope of their duties at the time of the collision. In the same connection error is assigned for letting it be proved the words "Polar Wave Ice Company" were on the moving wagon, and in support of this assignment we are cited to *McMullen v. Hoyt*, 2 Daly (N. Y.) 271, a case wherein it appeared the plaintiff had been hurt by being struck by a barrel of flour rolled from a truck in front of the store of the defendants along a skid which extended from the truck to the store. The plaintiff testified he noticed the initials of the defendants' firm on the truck, and instead of the admission of this evidence being held error, it was treated as a circumstance going to prove the truck belonged to the defendants and that the truckman who rolled the barrel was their servant. It is true the court said the mere fact of the initial being on the cart would

not make the defendants liable, nor would the fact that they were the owners of the vehicle, unless it was driven or controlled by some person in their service; but as regards the bit of evidence in question, the opinion treated it as relevant. The defendants had moved for a nonsuit "on the ground that the relation of master and servant between defendants and the truckman had not been established." This motion was denied by the court below and the upper court held correctly denied at the time it was made, that is, at the close of the testimony for the plaintiff; though it was held further, the evidence put in by the defendants showed the truckman was not in their employ, but was an independent contractor and owned the truck, horses and skid himself. However, in dealing with the propriety of refusing the nonsuit to the plaintiff at the close of his case, the court said: "There was some evidence on the subject, slight indeed, but it tended somewhat to show that the truckman was servant to the defendants. It appeared that the initials of the defendants' names were on the cart; it was unloaded before the defendants' store, and the barrels were rolled over the skid to the store, and were then received by defendants' clerks, and one of the defendants had used the expression 'my carmen' to plaintiff when addressed on the subject of the injury. This was some evidence for the consideration of the jury on the subject as to whether the defendants were not liable for the injury, and where there is any evidence the judge is not warranted in nonsuiting. [Labar v. Keplin, 4 N. Y. 547.]" In Schulte v. Holliday, 54 Mich. 73, an exception was saved to the admission of testimony to prove the defendant's name was on the wagon which injured the plaintiff by a collision with a wagon she was in. It was held there was no error in admitting the testimony. Other cases will be cited wherein the like evidence was held competent on the question of the sufficiency of the evidence to prove the wagon which occasioned the injury to the plaintiff was in charge of the defendant's ser-

vants and they were acting in the course of their employment at the time. On the authority of the cases already cited and those to be cited, we rule the court rightly permitted the name on the wagon to be proved. And while perhaps proof of that fact alone would carry to the jury the issue of defendant's liability, yet other facts were in proof and relevant to the issue. The wagon not only bore the name of defendant, but was similar to many wagons used in its business and seen in its yard in the immediate vicinity of the accident. The wagon was coming from the direction of said yard at the time; no other concern used similar wagons, some of the witnesses testified; defendant offered no evidence to prove the wagon did not belong to it, was not in charge of its servants, or, if it was, that the servants were not in the performance of a task for defendant at the time, but engaged upon some purpose of their own. Then, there is the fact of defendant sending the physician to examine plaintiff and ascertain the extent of her injury. The adequacy of evidence less cogent to make a prima-facie case of liability has been upheld by the courts of New York and Massachusetts, declared by text writers and never denied, we believe, by any court. In *Birnbaum v. Lord*, 7 Misc. Rep. N. Y. 493, the action was for negligence on the part of the driver of the defendants' vehicle in running over the plaintiff, a boy twelve years old, while he was crossing a street. The court ruled thus on a point relevant to the matter in hand: "As to the proof of ownership of the wagon, the defendants' name was on the wagon and there was no pretense of evidence on the trial that it did not belong to them. No witness was called by them on that point, although the proof of the fact, if it existed, must be deemed to be in defendants' possession; all presumptions on that point were therefore against them. [*Wernerstrom v. Kelly*, 7 Misc. Rep. 173, 27 N. Y. Supp. 326.] The ownership of the wagon and the agency of the driver were, therefore questions for the jury." In



*Ferguson v. Ehret*, 14 Misc. Rep. N. Y. 454, a collision case like the one in hand, the court said: "There was certainly evidence showing that a wagon bearing upon it the defendant's name and business address did collide with Hoeffler's wagon, which in turn and because of such collision, was forced over against plaintiff's wagon, breaking it, throwing him out and against the sidewalk, from which he suffered the injuries related by him. Such testimony certainly authorized the jury in finding that said wagon was one owned by defendant." The case of *Spitzer v. Express Co.*, 20 Misc. N. Y. 327, was to recover for injuries inflicted on the infant plaintiff by a wagon alleged to belong to the defendant and to have been driven by it or its employees. On appeal the defendant insisted the uncontradicted evidence showed the driver of the wagon was not in the employ of the defendant at the time of the accident. This driver worked for two express companies which delivered newspapers and kept their horses and wagons in the same place. He testified he drove for the defendant in the morning and for the other company in the afternoon. Nevertheless it was held a question for the jury whether he was using the defendant's wagon with its authority in the afternoon, as it appeared the defendant's name was on the wagon. It was "conceded that by this fact a prima facie case was made out against the defendant on the issue of the ownership of the wagon and the employment of the driver;" but it was contended the other evidence conclusively disproved the prima facie case. As said, the court overruled this contention. In *Diel v. Brewing Co.*, 30 App. Div. (N. Y.) 291, the plaintiff sued for damages caused by his tripping over some skids lying on the sidewalk immediately beside a wagon which stood at the curb and had on it the name of the defendant. The defense was the wagon was not in the control of the defendant's servants. The court said the only question argued on the appeal was the

sufficiency of the evidence to connect the defendant with the control of the wagon, it being conceded the presence of its name on the vehicle was *prima facie* evidence the vehicle "was owned by it and in its service." As in the previous case this item of evidence was not held to have been conclusively rebutted by evidence to the contrary, but on an examination of said evidence the court held the whole issue was for the jury. In *Tuomey v. Fogarty Co.*, 22 N. Y. Supp. 930, the defendant was charged with having permitted a cellar entrance to remain uncovered by a sidewalk while defendant's servants were engaged in delivering barrels of ale, into which opening plaintiff fell without her fault. Other points were discussed, but we are concerned only with the concluding paragraph of the opinion: "The complaint alleged that the appellant defendant was at the time of plaintiff's injury engaged in the brewing business in the city of New York, and owned trucks and horses, and employed drivers and assistants, in and about its business. This was not denied by the answer, and must therefore be taken as admitted (Code, Civil Proc., sec. 522); and the admission, with the evidence that the truck from which the ale was being delivered at the time of plaintiff's injury bore the name of 'O'Reilly, Skelly & Fogarty,' coupled with appellant defendant's refusal to disprove its ownership thereof, and the employment of the men assisting in the delivery of the ale, on the trial, was sufficient to sustain a finding that the truck was the property of appellant defendant, and the men its servants and employees. [*Seaman v. Koehler*, 122 N. Y. 646, 25 N. E. Rep. 353; *Wylde v. Railroad Co.*, 53 N. Y. 156.]" To the like effect is *Baldwin v. Abraham*, 67 N. Y. Supp. 1079. In *Perlstien v. Express Co.*, 177 Mass. 530, the plaintiff alleged damages due to the defendant's servant having driven an express wagon belonging to the defendant against the plaintiff's wagon on a street in Boston. The collision was proved and the defendant offered in defense to show

the routes traveled by its express wagons in the city, what men were employed on them and where it was the duty of each to go on the day of the accident, for the purpose of proving none of them was authorized to go past the corner where the accident occurred, and hence the driver, if there with his team, was not in the course of his employment. This evidence was rejected, the judge ruling the defendant might show its men were not at the point, but could not show where they should have been. On appeal the court above held the evidence was incompetent for the purpose of proving the wagon referred to was not one of defendant's wagons; then said: "But it was a part of the plaintiff's case to prove that the negligent driver was a servant of the defendant, acting within the scope of his employment at the time of the accident. To prove this he relied upon the inference that a person driving such a team as was described, the wagon being marked 'American Express Company' was one of the defendant's servants then engaged in the defendant's business. If the routes prescribed for the defendant's servants were such that at this time none of them could be driving through that part of Harrison avenue without, for the time, abandoning the service in which he was engaged and going off for some purpose of his own, the defendant would not be liable, even if the team which is said to have caused the collision was one of its teams, and was driven by a person who was regularly employed in its service. The question for the jury was not whether the defendant owned the team, but whether the person who was driving it negligently was then acting for the defendant in doing the work which he was directed to do. If the servant was not then acting in the course of his employment, but was off 'on a frolic of his own' the master would not be liable (citing cases). As bearing upon this question the defendant offered to show by the person who had charge of the drivers and helpers, the team service in Boston, that no driver of an express team of the de-

fendant had a right to be there that morning in the course of his employment. We are of opinion that the evidence was competent." The effect of said opinion is that the plaintiff by proving the wagon was branded with the defendant's name, established *prima facie* the driver was a servant of defendant and acting within the scope of his employment at the time. And so in *Diel v. Brewing Co.*, *supra*, it was held the name of the defendant on the wagon was *prima facie* proof of ownership and that the wagon was in charge of the defendant's servants. And in *Spitzer v. Express Co.*, *supra*, it was said that if a certain driver was driving the wagon of the defendant at the time of the accident, the reasonable inference was he did so by the authority of the company. See further as to brands being evidence of ownership: *Wigmore, Evidence*, sec. 150; *People v. Ballinger*, 71 Cal. 17; *State v. Wolfley (Kas.)*, 89 Pac. 1046, and cases cited in opinion; *Queen v. Forsyth*, 4 N. W. Terr. 398. A standard treatise states the following doctrine and cites cases in support of it: "When the plaintiff has suffered injury from the negligent management of a vehicle, such as a boat, car or carriage, it is sufficient *prima facie* evidence that the negligence was imputable to the defendant, to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control at the time and that the accident was occasioned by the fault of a stranger, an independent contractor, or other person for whose negligence the owner would not be answerable." [1 *Shear. & Red. Neg.*, sec. 158.] Note 1 to that text reads: "Proof of defendant's ownership of a wagon is *prima facie* evidence to charge him with responsibility for its management," citing *Norris v. Kohler*, 41 N. Y. 42; see *Boniface v. Relyea*, 6 Robt. 397; *Svenson v. Atlantic Mail S. S. Co.*, 57 N. Y. 108;

affirming 33 N. Y. Superior Ct. 277. Another treatise says: "Ordinarily evidence that the property, mismanagement of which caused the injury, was owned by and in the control of defendant, is prima facie evidence that the negligence was imputable to him . . . Ownership and possession may each be proved by direct testimony of a witness to the fact, subject, of course, to cross-examination. . . . a signboard is competent, but not necessarily sufficient." [Abbott, Trial Evidence, 735.] Still another treatise reads: "Evidence that the truck which struck the plaintiff bore the name of the defendant's firm, has been held to make out a prima facie case that the truck belonged to them and the driver in charge of it was its servant, where it failed to deny ownership." [6 Thompson, Neg., sec. 7659.] The same doctrine is thus declared in an encyclopedia: "It will be presumed that trains running on a railroad track are operated by the owner of the track. Similarly, delivery wagons are presumed to belong to and to be operated by the persons whose business names are upon them." [22 Am. and Eng. Ency. Law (2 Ed.), 1278.] Enlightened by those authorities we cannot doubt sufficient evidence was introduced by plaintiff to establish prima facie the wagon which caused her injury was owned by defendant, was in charge of its servants and they were engaged in defendant's service when the collision happened. Testimony was put in by defendant, but none was offered by it touching those issues, though it would seem to have been easy for defendant to prove it did not own the wagon or was not operating it by its servants, or they were not in the performance of their duty, if such was the fact.

The doubtful point on the appeal relates to the main instruction granted for plaintiff, which was drawn to embrace all the elements essential to recovery, but omitted one, namely, that the men in charge of the wagon, if found to be employees of defendant, were engaged at the time in a task pertaining to their employ-

ment and were not in the pursuit of their own business or pleasure. [Garetzen v. Duenckel, 50 Mo. 104; Milton v. Railroad, 193 Mo. 46, 57, 91 S. W. 49; Chicago Herald Co. v. Bryan, 195 Mo. 574, 92 S. W. 906; Wahl v. Transit Co., 203 Mo. 261, 272, 101 S. W. 1.] We have held the evidence for plaintiff so far established all the issues, including those of ownership of the wagon and team, its control by defendant's servants, and whether they were doing defendant's work, as to make a prima facie case. But it was for the jury to find upon the questions enumerated as well as the questions of whether the wagon and team were carelessly driven, plaintiff was hurt in consequence, what injuries she suffered, and what damages should be awarded. In this case the proof was not conclusive enough in support of either side of any contested issue to warrant its withdrawal from the jury's consideration by directing them how they should find on it, or by assuming it was settled in favor of one of the parties and omitting to require a finding on it, as has been done sometimes. Though defendant offered no evidence in relation to the ownership of the wagon and team, who was in charge of them and for what purpose, it contested those matters throughout, and did not try the case on a theory that excused plaintiff from proving the facts were as she contended, as did the defendant in Wahl v. Transit Co., supra. The evidence for plaintiff touching said questions was far from cogent and only sufficient to permit inferences by the jury. The party against whom such evidence is introduced is entitled to have the jury weigh it and find from it what they deem were probably the facts. See Gregory v. Chambers, 78 Mo. 294, where the subject was treated and the cases reviewed; also Schroeder v. Railroad, 108 Mo. 322, 18 S. W. 1090, and Gannon v. Gaslight Co., 145 Mo. 502, 46 S. W. 968. It is argued defendant was called on to prove that if the men in the wagon were its servants, they were not in the course of duty at the time. This issue cannot be

separated upon principle, from the issues of defendant's ownership of the wagon and team and control of them through its servants. Plaintiff carried the burden of proof as to the three matters and sustained it by the evidence she put in, but not beyond just inferences by reasonable minds against her; and this is the more true as regards the errand of the men in the wagon, because the contents of the wagon did not tend, without explanation, to prove the errand was connected with defendant's business. It is true the courts have held defendants in like cases are called on to exonerate themselves by testimony to show the culpable persons were not their employees, or were not in the line of their duty when their careless doing led to an accident, and have said those facts would be presumed. But we understand the courts to mean it is incumbent on a defendant to show those facts in defense after the plaintiff has shown *prima facie* to the contrary, and that the word "presumed" is used in the sense of "inferred," and, moreover, not to signify the inference was compulsory, but only that it might be made by the jury. We do not understand it to be meant the plaintiff has no burden of proof as to said issues in the first instance. The existence of said facts is essential to his right to a verdict, and he carries the burden of proving them as he does of proving any other essential fact. Though the courts have said the burden of proof is on the defendant as to such an issue, we conclude they meant the burden of evidence shifts when the plaintiff has introduced evidence on his side from which the jury may make a finding (see 16 Cyc. 926). The instruction under review required the jury to find only that the wagon and team were in charge of and driven by defendant's servants, which fell short of requiring them to find the servants were engaged at the time in the course of their employment. The case of *Louisville Water Co. v. Phillips, Admr. (Ky.)*, 89 S. W. 700, cited by counsel for plaintiff is against their position, for the

instruction there considered told the jury they must find the death of the deceased was caused by the negligence of the defendant's servants "while in the service of the defendant." Besides, the court refused to reverse because the defendant had asked a charge in similar words, criticising as unsatisfactory the charge for which error was assigned.

The judgment is reversed and the cause remanded. All concur.

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**KIRKWOOD MANUFACTURING & SUPPLY COMPANY, Respondent, v. LOUISE SUNKEL, Appellant.**

St. Louis Court of Appeals, April 19, 1910.

1. **MECHANICS' LIENS: Misdescription of Premises: Including Land of Another: Including Less than One Acre.** Where a mechanic's lien statement described the land on which the building was constructed and also adjoining land belonging to another which was not subject to the lien, it was not fatally defective, but was enforceable as to the parcel containing the improvement, its metes and bounds being clearly established by the proof; and the fact that the parcel would not include one acre could prejudice no one but plaintiff.
2. ———: ———: **Right to Lien on Improvement.** A mechanic's lien claimant who has misdescribed the ground on which the improvement was erected has a right to have a lien on the improvement, apart from the ground.

Appeal from St. Louis County Circuit Court.—*Hon. J. W. McElhinney, Judge.*

REVERSED AND REMANDED (*with directions*).

*Thos. H. Sprinkle* for appellant.

(1) The description of the property was not a true description or so near as to identify same, consequently



the lien must fail and suit against the owner dismissed. R. S. 1899, secs. 4203, 4207; Williams v. Porter, 51 Mo. 441; Wright v. Beardsley, 69 Mo. 548; Matlack v. Lare, 32 Mo. 262; Oster v. Rabeneau, 46 Mo. 595; Mayes v. Murphy, 93 Mo. App. 37; Planing Mill v. Christophel, 60 Mo. App. 106; Powers, etc., v. Muir, 123 S. W. 490. (2) The contract sued on herein not being entered into between respondent and Hogan, is not binding on this appellant. Duross v. Broderick, 78 Mo. App. 260; Lumber Co. v. Myers, 87 Mo. App. 671; Richardson v. O'Connell, 88 Mo. App. 12; Hengstenberg v. Hoyt, 109 Mo. App. 622. (3) Furnishing material to workmen creates no right of lien in the party furnishing the material. Boisot on Mech. Liens, sec. 244, p. 238; Greenway v. Turner, 4 Md. 296; Ogg v. Tate, 52 Ind. 159; Brown v. Cowan, 110 Pa. St. 588.

*J. G. Hawken* for respondent.

(1) The rule as to description of the property is that if there appears enough to enable a party familiar with the locality to identify the premises, with reasonable certainty, it is sufficient. DeWitt v. Smith, 63 Mo. 267. (2) The Mechanics' Lien Law is a remedial statute, and must not be construed with unfriendly strictness. McQuillin's Mo. Practice, sec. 1784, p. 1088, and authorities there cited. (3) Hogan's contract with respondent is binding upon appellant. The materials furnished were used in defendant's house. Lumber Co. v. Harris, 107 Mo. App. 148; Crane Co. v. Neel, 104 Mo. App. 177.

GOODE, J.—Plaintiff, an incorporated company, furnished material in 1907 to William J. Hogan, who had contracted with the defendant Louise Sunkel to build a two-story brick dwelling for her on a lot she owned in St. Louis county. The material furnished consisted of door frames, window frames, moulding and other articles which will not be enumerated as there

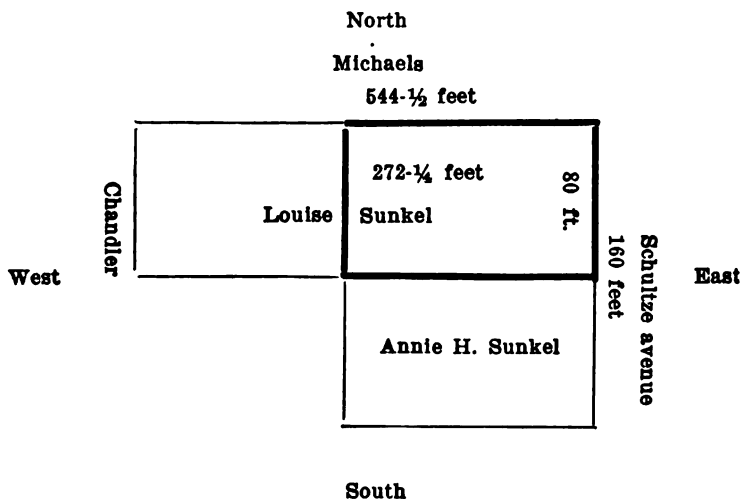
is no contention about them. Hogan did not pay plaintiff for the material and in due time a lien account was filed and the present action brought to enforce it. The controversy in the case relates to the sufficiency of the description in the lien account, petition and judgment of the parcel of ground on which a lien is sought. This is the description contained in the three documents:

"A lot of ground containing one acre, beginning at a point of the center line of Schultze avenue, where said center line is cut by the south line of property of Minnie Michael described in a deed dated March 25, 1907, and of record in the recorder's office of St. Louis county, Missouri; thence west along said south line of said Michaels two hundred seventy-two and one-quarter (272 1-4) feet, thence south and parallel with said center line of Schultze avenue one hundred sixty (160) feet, thence east and parallel with the above defined north line two hundred seventy-two and one-quarter (272 1-4) feet to the center line of said Schultze avenue and thence north along said center line of Schultze avenue one hundred and sixty (160) feet to the point of beginning. The same being the east one-half of a lot of ground described in deed of record in the recorder's office of St. Louis county in book 213, page 145."

The court found in favor of plaintiff and against Hogan the contractor, and that the latter was indebted to plaintiff in the sum of \$479.20, for which judgment was entered against Hogan; further found plaintiff had established and was "entitled to a lien for said sum against a certain two-story brick dwelling house on a certain piece or parcel of ground, situated in the county of St. Louis and State of Missouri, and described in said petition as follows, to-wit," whereupon the above description is set out. The concluding part of the judgment orders, "if sufficient property of said defendant William J. Hogan cannot be found wherewith to satisfy said judgment, interest and costs, then that the same or the residue thereof be levied on and enforced

## Manufacturing &amp; Supply Co. v. Sunkel.

against the hereinabove described building and land upon which the same is situated as aforesaid, charged with a special lien thereof, and that a special *feri facias* issue in conformity herewith." The description given in the judgment, petition and lien statement covers a lot on the west side of Schultze avenue, facing east, and 160 feet wide by 272  $\frac{1}{4}$  feet deep, or extending back that far from the west line of Schultze avenue. The use of the word "avenue" suggests the lot is in a town; but it is not so stated and we surmise from the record it is in a platted addition to the city of Kirkwood, which lies outside the city limits. The lot owned by defendant Louise Sunkel has a width of only eighty feet on the avenue instead of one hundred and sixty feet, and instead of extending back two hundred seventy-two and one-quarter feet, extends back twice that distance, or five hundred forty-four and one-half feet. Annie H. Sunkel owns a lot eighty feet wide immediately south of the lot of Louise Sunkel and extending back half the depth of the latter lot. This plat will indicate the situation of the properties and that portion (*i. e.*, the east half) of Louise Sunkel's which is inclosed by heavy lines is where the house is built.



In describing the property in the lien account and petition and also in the judgment, only the east half of appellant's lot was described, and along with it all of Annie H. Sunkel's lot. The evidence taken at the trial proved this, but nevertheless the judgment followed the description given in the lien statement and petition. Perhaps the recital quoted from the judgment would induce us to conclude the court meant to declare a lien only on the building, but the final paragraph orders the lien enforced against the building and the land as described in the judgment; which would require it to be enforced against Annie H. Sunkel's lot as well as the east half of Louise Sunkel's. The latter's attorney contends the description was so erroneous as to prevent a lien from attaching to any part of the premises. The statute requires a person who seeks to fasten a lien on property, to set out in his account a true description of the property on which the lien is intended to apply or one "so near as to identify the same." [R. S. 1899, sec. 4207.] There is no uncertainty in the description in the lien account, but the difficulty is, part of the ground described did not belong to the owner of the house for which the material was furnished and, of course, is not subject to plaintiff's claim. Hence the question for decision is not whether the ground is described with certainty, but whether the lien can be maintained on that portion of it owned by Louise Sunkel and on which the building stands, when the proof shows the calls and boundaries take in a lot she does not own. According to the decisions this error did not prevent the lien from attaching upon the portion of the ground owned by her and where the building is. The rights of no purchaser, creditor or other lienor or incumbrancer are involved, the case stands between Louise Sunkel and plaintiff who furnished the material which became part of her house. The cases nearest in point are those wherein an excess of property was described in the account, and this mistake was held not to vitiate the lien

if the interest of no third person was at stake. In *Oster v. Rabeneau*, 46 Mo. 595, the ground described embraced more than one acre and the court assumed, for the purposes of the case, that though the improvement was on a city lot, only an acre could be made subject to the lien, and held it would be unjust and contrary to the purpose of the statute to rule the lien was wholly void. In said case the acre on which the improvement stood had been ascertained by the county surveyor, the survey had been adopted by the circuit court in giving judgment, and this course was approved. In *DeWitt v. Smith*, 63 Mo. 263, the account stated the right numbers of the lots, but located them in block 2, instead of block 20, and the lower court held the mistake was fatal. On appeal the Supreme Court held the statutory requirements were complied with because the description would enable a party familiar with the locality to identify the premises meant to be charged with the lien. The opinion said if a third person had purchased the property without other notice than the account filed, he might have been misled and then a different rule would be applicable. In *Ransom v. Sheehan*, 78 Mo. 668, the material had been furnished for a building which was said in the statement to stand on a described tract of land containing fifteen and one-half acres, and the lien was asked on the building and one acre about it. The court said the description of the tract by its exterior boundaries was neither exact nor so near as to identify the acre, and denied the lien because the rights of third parties would be affected by enforcing it; for that reason distinguishing the case from *Oster v. Rabeneau* and *DeWitt v. Smith*, *supra*. In *Bradish v. James*, 83 Mo. 313, the ground where the improvement was erected contained more than an acre as described in the petition and statement. The description was by metes and bounds, and though the parcel described was in excess of an acre, the court said the true doctrine settled in *Oster v. Rabeneau* and *DeWitt v. Smith* was that a

description specific and definite enough to permit one to identify the premises intended to be covered by the lien, was sufficient; saying further it would be difficult to identify the acre to which the lien in the instant case would apply, and unless the trial court could ascertain and specify the acre so as to identify it as the site of the building, no intelligent judgment could be rendered. This was not a definite decision on the sufficiency of the description, but was an indorsement of the rule declared in the prior cases. In *Holland v. McCarty*, 24 Mo. App. 82, a lien was sought on the St. Louis Fair Grounds, one hundred and fifty acres in area, and as in *Oster v. Rabeneau*, the court assumed the lien could be declared only against one acre. No special description of this acre was given in the petition or account, but the court said the description of more than an acre in the account did not destroy the right of lien altogether; but as between the person asserting it and the owner, it was competent for the trial court to ascertain by commissioners, or otherwise, what acre of the described tract the lien should be established against. In *Rawle Bros. v. McCrary*, 45 Mo. App. 365, the description in the account of the tract on which the improvement had been made, embraced sixty-four acres, and there was nothing to show in what part of the tract the acre to be charged lay. But as no third parties were interested in the case, the court, following the decision *supra*, held the particular acre on which the barn stood could be located and the boundary established; that the owner of the entire tract would be presumed to know, not only the boundaries of his land, but the part of it where stood the improvement into which the material entered. Consistently with the doctrine of those cases a writer on the subject of *Mechanics' Liens* says the inclusion of too much land in the notice of a lien account, petition, affidavit or other papers, is not fatal in the absence of fraud and the lien will attach against the proper quantity of the parcel of land. [Phillips, *Mechanics' Liens* (3 Ed.), sec.

387.] The decisions *supra* were not given on facts identical with those before us, but we think this case falls within the principle established; which is that when the account fails to describe the exact quantity of ground charged with a lien, but includes the quantity in the description of a larger tract, the lienable part will be charged, and the court will ascertain it and give judgment accordingly. In the instance before us land belonging to appellant and where the house stands is embraced in calls which embrace other ground, and a part of her lot is omitted. These errors are not fatal, because they can work no harm to any one and did not even leave appellant in doubt about what property of hers was intended to be charged with the lien. The metes and bounds of this tract were clearly established by the proof; and the lien could have been declared on it without affecting any third person's interests. It is not necessary to resort to a survey or commission, and while it is true the parcel would not include an acre, that circumstance could prejudice only the plaintiff.

We remark further the law appears to be settled now in favor of the right of a lien claimant who has misdescribed the ground on which an improvement was erected, to have a lien on the improvement, apart from the ground. [*Sawyer v. Lumber Co.*, 172 Mo. 588, 598, 73 S. W. 137.] There have been decisions by the Supreme Court to the contrary. [*Ransom v. Sheehan*, 78 Mo. 668; *Williams v. Porter*, 51 Mo. 441.] And this court has followed them. [*Mayes v. Murphy*, 93 Mo. App. 37.] But there was a prior decision given in *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279 in accord with *Sawyer v. Lumber Co.*, *supra*, and in the latter case the Supreme Court reverted to the rule stated in the former.

The judgment wrongly enforced the lien against Annie H. Sunkel's lot; wherefore it will be reversed and the cause remanded with a direction to the court

below to enter judgment enforcing it against no ground except that part of Louise Sunkel's lot which is described in the petition. All concur.

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LOUIS BLAKE, Respondent, v. LOUISE SUNKEL,  
Appellant.

St. Louis Court of Appeals, April 19, 1910.

MECHANICS' LIENS: Kirkwood Mfg. & Sup. Co. v. Sunkel, *Ante*,  
followed.

Appeal from St. Louis County Circuit Court.—*Hon.*  
*J. W. McElhinney*, Judge.

REVERSED AND REMANDED (*with directions*).

*Thos. H. Sprinkle* for appellant.

*J. G. Hawken* for respondent.

GOODE, J.—This case involves the same question of law and the same mistake of description which appear in the case of Kirkwood Manufacturing & Supply Co. v. Louise Sunkel, 148 Mo. App. 136, 128 S. W. 258; wherefore the judgment will be reversed and the cause remanded with a direction to the court below to enter judgment declaring and enforcing the lien of plaintiff against that part of the premises described in the petition which belongs to defendant Louise Sunkel. All concur.



**WILLIAM B. THOMPSON, Appellant, v. MAE SIMPSON, Defendant; GAIUS PADDOCK, Respondent.**

**St. Louis Court of Appeals, April 19, 1910.**

1. **TRIAL PRACTICE: Dismissing Appeal from Justice's Court: Improper to Exercise Jurisdiction when Appeal Dismissed.** On an appeal from a justice's court to the circuit court in an attachment suit, where the appeal was dismissed for lack of jurisdiction in the circuit court in consequence of the justice from whom the appeal was taken having no jurisdiction, it was improper to overrule a motion filed by appellant to establish the priority of his lien, since that act was an exercise of jurisdiction.
2. **JUDGMENTS: Conclusiveness.** A judgment entry must be taken to express the true ruling of the court.
3. **ATTACHMENT: Jurisdiction: Misnomer of Defendant.** In attachment, jurisdiction over the subject-matter is obtained by the levy thereon of a writ properly issued, and no matter what error or irregularities may subsequently occur, the *res* remains in the grasp of the court, and its judgment in regard thereto will be valid until reversed or set aside in a direct proceeding for that purpose; and hence an attachment levy on property was not void because defendant, a married woman, was sued by her maiden name.
4. **——: Priority of Liens.** The levy not being a nullity, one subsequently bringing attachment could not acquire priority, under section 415, Revised Statutes 1899, where he knew when he levied his writ that the other plaintiff had sued and levied on the property, and knew the amount of claim and did not think of opposing the attachment, or that he could do so, until after he had ascertained the mistake in defendant's name, when he seized on the mistake as a means to obtain a lien prior to the other plaintiff's, which he had previously endeavored to get out of the way by a settlement.

**Appeal from St. Louis City Circuit Court.—Hon. Geo. H. Williams, Judge.**

**AFFIRMED.**

*Fred Armstrong, Jr.*, for appellant.

(1) Calling a married woman by her former name is a misnomer. *Traver v. Railroad*, 3 Keys (N. Y. Ct. of App.) 497; *Beavers v. Baucum*, 33 Ark. 722; *Commonwealth v. Brown*, 2 Gray (Mass.) 358. See also: *Dobell v. Loker*, 1 Handy 574; *Turner v. Gregory*, 151 Mo. 103; *Trayer v. Wood*, 96 Mo. 478; *Chamberlain v. Blodgett*, 96 Mo. 483; *Whelan v. Weaver*, 93 Mo. 430; *Burge v. Burge*, 94 Mo. App. 15; *Lorie v. Abernathy*, 63 Mo. App. 248; *Graton v. Land & Lbr. Co.*, 189 Mo. 322; *Keaton v. Jorndt*, 220 Mo. 117. (2) Attachment by misnomer is void, at least as to subsequent attaching creditors. *Lorie v. Abernathy*, 63 Mo. App. 249; *Dobell v. Loker*, 1 Handy 574; *Davenport v. Doady*, 3 Abb. Pr. 409; *Patrick v. Solinger*, 9 Daly 149; authorities under point 1. (3) The fact that persons interested know who is, in fact, intended by the misnomer is immaterial. *Lorie v. Abernathy*, 63 Mo. App. 249; *Green v. Meyers*, 98 Mo. App. 438; authorities under point 2. (4) (a) The proper method of determining priority of attachment is under section 415, R. S. 1899. *Bank v. Steinberg*, 44 Mo. App. 401; *Patterson v. Stephenson*, 77 Mo. 329; *Sutton v. Stevens*, 41 Mo. App. 44; *Metzner v. Graham*, 57 Mo. 404. (b) This procedure is the proper one so long as the liens of two attachments conflict, *e. g.*, when the second attachment is levied on personal property after judgment in the first attachment suit, but before execution; for the lien of the attachment persists until execution, and the judgment lien does not take effect till levy of the execution. R. S. 1899, sec. 3187; 4 Cyc. 625 and 652, and cases cited on both pages; *Ensworth v. King*, 50 Mo. 477; *Pepperdine v. Bank*, 100 Mo. App. 387; *Rudolph v. McDonald*, 6 Neb. 163; *Burnham v. Dickson*, 5 Okla. 112; *Bourne v. Hocker*, 50 Ky. 23; *Wallace v. Sharick*, 15 Wash. 643; *Hanchett v. Ives*, 133 Ill. 332, *contra*, concededly against weight of authority on *stare decisis*. *Moore v. Fitz*, 15 Ind. 43;

Eddy v. Weaver, 37 Kan. 540; Bank v. Reinitz, 4 N. Y. Supp. 801. So long as the lien of the attachment persists, claims to the property itself are founded only on the attachments, and this is the precise situation the statute is intended to control. Stephenson v. Parker Sta. Co., 142 Mo. 13; Bank v. Steinberg, 44 Mo. App. 401; Metzner v. Graham, 57 Mo. 404; Burnham v. Blank, 49 Mo. App. 56; Adler v. Anderson, 42 Mo. App. 189. (5) Judgment obtained by misnomer on default under publication is absolutely void and subject to attack collaterally as well as directly. Turner v. Gregory, 151 Mo. 100; cases cited under point 1. It goes without saying that no process should issue on a judgment absolutely void, no matter how the fact that it is void comes to the court's attention. (6) When once files in a justice court have been sent to a circuit court on appeal, they become files of the circuit court, and should not be returned to the justice court after judgment in the circuit court. R. S. 1899, secs. 4069, 4072. (7) An appeal, regular and proper in form, should not be dismissed merely because the appellate court holds contrary to the lower court, nor even because the appellate court holds the lower court to have been without jurisdiction. St. Louis County v. Lind, 42 Mo. 348; Esler v. Wabash, 115 Mo. App. 574.

*Roland M. Homer* for respondent.

(1) The justice of peace had no jurisdiction to determine the priority between the judgment of Paddock and the attachment of plaintiff. R. S. 1899, sec. 415; Swallow v. Duncan, 18 Mo. App. 622; Bank v. Steinberg, 44 Mo. App. 401; Stevenson v. Stationery Co., 142 Mo. 13. (2) The Paddock attachment suit, brought against Mae Becker, the name which was signed to the lease, the name in which the bank stock stood, the name which the bank returned as being the holder of said stock, the only name she ever used in Missouri,

was properly brought, the attachment properly sustained and the judgment properly rendered. *Moseley v. Reilly*, 126 Mo. 128; *Parry v. Woodson*, 33 Mo. 347; *Walker v. Railroad*, 193 Mo. 476; *Schaeffer v. Brewery Co.*, 4 Mo. App. 118; *Railroad v. Burress*, 82 Ind. 83. (3) There was no evidence in the case that justified any finding that Mae Becker had changed her name to Mae Simpson prior to the Paddock judgment. (4) The contract sued upon in the Paddock case was executed in the name of Mae Becker, and suit may always be brought against a party in the name in which the contract is executed. *State v. Kelly*, 191 Mo. 687; *Comer v. Jackson*, 50 Ala. 387; *Rich v. Mayer*, 7 N. Y. Supp. 69; *Kemp v. McCormack*, 1 Mont. 420; *McColgan v. Oklahoma*, 5 Okla. 567; *Graham v. Essgner*, 28 Ill. App. 273; *Commonwealth v. Hughes*, 10 B. Mon. 160; *Turner v. Gregory*, 151 Mo. 100; 14 Ency. Pl. and Pr., 283. (5) In an attachment proceeding creditors other than the plaintiff cannot take advantage of irregularities in the original case, although they be such as would furnish good ground for objection on the part of the defendant. *Rudolph v. McDonald*, 6 Neb. 163; *Drake on Attachment*, sec. 273; *Freidenberg v. Pierson*, 18 Cal. 152; *Scrivener v. Dietz*, 68 Cal. 1; *Harvey v. Foster*, 64 Cal. 296; *Ward v. Howard*, 12 Ohio St. 158; *Van Camp v. Bank*, 147 N. Y. 150; *Freedman v. Holberg*, 89 Mo. App. 345. (6) The right party was sued by Paddock. It is simply a question of identity. *Parry v. Woodson*, 33 Mo. 347; *Beavers v. Baucum*, 33 Ark. 722; *Travers v. Railroad*, 3 Keys 497; *Lane v. Duchac*, 73 Wis. 654; *Peterson v. Little*, 74 Iowa 223; *Bank v. Jagers*, 31 Md. 38; *Green v. Reserve Assn.*, 79 Mo. App. 179; *Walker v. Railroad*, 193 Mo. 476; *Schaeffer v. Brewery Co.*, 4 Mo. App. 118. (7) The appellant appealed to equity powers of the circuit court. There is no doubt of the "good faith" of Paddock. Can as much be said for the appellant? R. S. 1899, sec. 415; *Freedman v. Holberg*, 89 Mo. App. 340.

GOODE, J.—This contest is between two attaching creditors whose writs were levied on the same shares of bank stock owned by the defendant. The first action was instituted by respondent Gaius Paddock on September 23, 1907, before Justice Spaulding in the city of St. Louis. The defendant in said action was designated as Mae Becker, which had been her name until the summer of 1907, and she was known by it in St. Louis where she lived, and under it had made the lease Paddock sued on, his action being for five hundred dollars for the rent of the demised premises which accrued after she had abandoned them and left the state. At the time the action was instituted, and when the judgment was given, October 30, 1907, neither Paddock nor appellant Thompson knew the defendant had married a man named Simpson, as she had in Lake county, Indiana, July 18, 1907. The Paddock writ of attachment was levied by a constable September 24, 1907, "on all shares of stock in the Franklin Bank as the property of said defendant." The bank reported there were two shares standing in the name of Mae Becker and an undivided interest in half a share standing in the name of Jewel and Mae Becker, the shares being subject to a debt due the bank. No personal service was had on her, but she was notified by publication and on October 30th judgment was rendered for five hundred dollars by default in favor of Paddock and against Mae Becker, to be satisfied out of the attached property. Appellant held a demand against the defendant Mae Becker-Simpson, and appears to have represented some other persons who had claims against her. After judgment had been given for Paddock, a conversation occurred between him and Thompson about the shares, wherein Thompson agreed he would endeavor to induce Mrs. Becker to settle Paddock's demand for three hundred dollars, which the latter was willing to take by way of compromise. Thompson was not her attorney in the Paddock case but he had been in previous mat-

ters, and his purpose was to get rid of Paddock's lien so the shares could be attached by himself and other creditors of Mrs. Becker for their demands. He wrote her about the proposed settlement, she being then in Chicago or Indiana, and on receipt of her reply learned for the first time she had married again and her name was Simpson. The negotiation for a settlement fell through and on November 20, 1907, appellant filed an action of attachment before Justice Grier of St. Louis against defendant by the name of Mae Simpson. The writ was issued returnable December 4, 1907, the Franklin Bank garnished and the writ returned by the constable as having been levied on all the interest of Mae Simpson in two shares of the capital stock of said bank, represented by certificate No. 5109, and one-half share of said stock standing in the name of Mae Becker and Jewel Becker, a minor. Notice by publication was given in said action to Mae Simpson and later, on January 3, 1908, the attachment was sustained and judgment rendered by default against defendant, to be satisfied out of the attached property. After judgments had been obtained as stated against defendant in favor of both appellant and respondent, the former, on January 21, 1908, filed a motion in Justice Grier's court, recited the institution of the prior action by appellant before Justice Spaulding and the prior levy of the writ issued in said action, recited further respondent claimed the defendant designated as Mae Becker in his action was the same person who was designated as Mae Simpson in appellant's action, alleged the misstatement of her name in the first action rendered the attachment therein void against the junior action, asked the justice to transfer the case of Thompson versus Mae Simpson to the court of Justice Spaulding that the latter might settle and determine all the controversies which had arisen between the plaintiffs in the two cases in relation to the property, "and the priority, validity, good faith, force and effect of the different attachments," as provided in

section 415 of the Revised Statutes of 1899. This motion was sustained and the papers and transcript of the cause transmitted to Justice Spaulding February 3, 1908. Later appellant appeared and filed a motion in Justice Spaulding's court, reciting the facts as we have stated them, and praying said court to dissolve the attachment in the case of Gaius Paddock against Mae Becker and postpone it to the attachment levied by appellant, on the ground the first attachment was void as against appellant in consequence of the writ having been issued and levied in it under a name other than that of the owner of the property. This motion was heard March 20th and the justice determined he had no jurisdiction. An appeal was taken from the decision of Justice Spaulding to the circuit court where respondent filed a motion to dismiss the appeal. The matter was heard March 19, 1909, at the February term, between appellant and respondent, the defendant Mae Becker-Simpson not appearing. The court overruled the motion of appellant to dissolve and postpone the first attachment, sustained the levy of the attachment in said case as prior to the levy of appellant, directed all papers in the first case to be returned to Justice Spaulding and ordered said justice to proceed to enforce the levy; adjudged further, that the appeal taken by appellant be dismissed at his cost and the cost of Wm. E. Becker, surety on the appeal bond. An appeal was taken from the judgment of the circuit court to this court.

It is to be borne in mind the motion by appellant before Justice Spaulding to establish the priority of his lien, was filed in his own case against Mae Simpson and the appeal from the justice's judgment was taken in said case. Really it does not appear that any appeal or proceeding occurred in Justice Spaulding's court which carried to the circuit court the case of Paddock v. Becker, but the justice transmitted the papers in said case. This partly explains the apparent incongruity

in the judgment, which dismissed the appeal taken by Thompson in his case against Mae Simpson, ordered the costs taxed against him and his surety on the appeal bond and at the same time overruled his motion to dismiss and postpone the attachment in the Paddock case, ordered the papers in said case returned to the justice and directed the justice to proceed to enforce the levy in it. Nevertheless a certain inconsistency remains in the judgment given in the case of Thompson v. Simpson, the one at bar, for though the appeal of the plaintiff from the justice's decision was dismissed, the plaintiff's motion for postponement of the Paddock lien was overruled. No theory is suggested on which the appeal could have been dismissed, except lack of jurisdiction in the circuit court, in consequence of Justice Spaulding having acquired no jurisdiction of Thompson v. Simpson by the order of Justice Grier transferring it to him. But if there was a lack of jurisdiction in the first instance in Justice Spaulding, and consequently in the circuit court, the judgment overruling appellant's motion filed in the cause was improper since it was an exercise of jurisdiction; and probably the judgment entry does not express the true ruling of the court; but of course it must be taken to express it. From any point of view the effect of the judgment is to leave the Paddock lien intact as the first lien and to leave appellant's lien subject to it. In our opinion, and for reasons to be stated, this was the right result. Taking for granted, for the purposes of the decision, that Justice Spaulding acquired jurisdiction of Thompson v. Simpson, and might settle the controversies between the two attaching creditors notwithstanding the cases of both had passed already into judgment and Paddock's judgment had been obtained before Thompson's action was instituted, we will set forth the reasons why we think appellant was not entitled to be accorded priority to respondent's lien. The argument for appellant is that as respondent sued defendant by a name she did not bear at the time the



action was commenced, and took out publication against her under said name, no lien was fastened on the bank shares by levying the attachment, and, therefore, appellant acquired the first lien when he levied his writ in November. We think an important fact in dealing with this question is that appellant was not misled to his prejudice by respondent's having sued defendant as Mae Becker, instead of Mae Simpson; when appellant levied his writ he knew respondent had sued already and levied on the shares of stock and the amount of his claim. In truth appellant did not think of opposing said attachment, or that he could do so, until after he had ascertained the mistake in the name of defendant, when he seized on the mistake as a means to obtain a lien prior to respondent's which previously he had recognized and endeavored to get out of the way by a settlement. Therefore it is obvious appellant has no footing more meritorious than a technical one on which to claim priority. Nevertheless priority should be awarded to him if respondent's attachment is absolutely void and created no lien in consequence of the mistake. As respondent's action was by constructive service, possibly the decisions of our Supreme Court would sustain the proposition that the judgment was void if it had been given in an action for taxes, or in any other than an attachment action. [Skelton v. Sackett, 91 Mo. 377; Vincent v. Means, 184 Mo. 327, 82 S. W. 96; Gillingham v. Brown, 187 Mo. 181, 85 S. W. 1113.] It long has been declared in this State that in an action of attachment the jurisdiction of the court is obtained by the levy of the writ. In Hardin v. Lee, 51 Mo. 241, the court thus stated the law: "In attachment causes the jurisdiction over any given subject-matter is obtained by the levy thereon of a writ properly issued. And no matter what, nor how great errors or irregularities may subsequently occur, the *res* remains still in the grasp of the court, and its judgment in regard thereto will be valid and binding, until reversed on error or by appeal,

or set aside in a direct and appropriate proceeding for that purpose." This doctrine has been adhered to until the present time in a series of decisions of which we cite *Freeman v. Thompson*, 53 Mo. 183; *Holland v. Adair*, 55 Mo. 40; *Williams v. Lobban*, 206 Mo. 408, 104 S. W. 58; *Randall v. Snyder*, 214 Mo. 23, 112 S. W. 529. The Supreme Court in *Randall v. Snyder* distinguished anew actions by attachment, where property had been levied on, from other classes of actions as regards the effect upon jurisdiction of a defective order of publication. In said case the order of publication involved, and pursuant to which judgment had been given and land sold and purchased, did not describe the land, wherefore it was contended in a collateral action no title had been obtained by the purchaser at the execution sale. It was said that though in a case for delinquent taxes the omission from the order of publication of the description of the land would be fatal, a different rule applied where land had been attached and thereby the court had obtained jurisdiction of it; that is, of the *res*. In *Williams v. Lobban*, the like distinction was taken and it was said in an action for taxes against a party, if the service was constructive and designated the party by the initials of his name, the mistake would be fatal, but it was not so where the action was by attachment. Perhaps the most thorough consideration of the question and review of the authorities will be found in the opinion of Judge SHERWOOD in *Freeman v. Thompson*, *supra*. Among other cases examined was *Payne v. Moreland*, 15 Oh. 435, wherein it appeared a statute required notice of an attachment to be published six weeks or the action to be dismissed; appeared further the notice had not been published and judgment had been rendered without publication and the attached property sold; yet the Supreme Court held the proceeding valid. The case of *Cooper v. Reynolds*, 10 Wall. 308, was also cited, wherein the Supreme Court of the United States said when property was attached

and there was no service on the defendant or appearance by him, the proceeding was essentially one *in rem*, and the prerequisite of jurisdiction was levy of the writ of attachment, without which levy the court could not proceed, but with it could proceed and subject the property to the demand of the plaintiff. If we concede for argument's sake only, that if the action by Paddock against Mrs. Becker had not been by attachment, the mistake in her name would have been fatal to the judgment, there being only constructive service, it is clear under the authorities *supra* this could not be the result, considering the nature of the action. It follows appellant's motion for priority should not have been sustained on the theory that no lien was acquired by the levy of the Paddock writ but said levy was utterly void.

Appellant argues further that if not void as to every one, the levy was void as against his junior attachment, citing in support of the proposition *Lorie v. Abernathy*, 63 Mo. App. 249, wherein the plaintiff Abernathy had sued a corporation, the real name of which was the Wing Furniture Company, as the M. A. Wing Furniture & Auction Company. Lorie had afterwards sued in the correct name and his later levy was made the prior lien, the court saying Abernathy's attachment was not a lien as to third parties because it had been issued against "some other entity" instead of the Wing Furniture Company. If that is true, the levy would seem to have been a nullity as against the true defendant, and the remark of the court which discriminates the case from the one at bar was superfluous, yet the court treated the fact of the second levy having been made believing it was the first as important. The court declared it must hold Lorie was entitled to priority because he "instituted his action and went to expense, in reliance upon the record fact that there was no attachment lien in favor of Abernathy against the Wing Furniture Company." The decisions given in the cases cited in the opinion in support of its doctrine turned on the fact of the junior lien

having been obtained in ignorance of the first levy. [Terry v. Sisson, 125 Mass. 560; Moore v. Graham, 58 Mich. 25.] In the Massachusetts case an attachment action had been brought against Sarah Sisson and a bank garnished as her debtor. There was no account in the bank in the name of Sarah Sisson, but one in the name of Sarah F. Sisson. After the levy the bank disbursed the account to Sarah F. Sisson, the depositor, and was exonerated from liability under the garnishment. The court said in Massachusetts the middle name or initial was an essential part of the name, and therefore Sarah Sisson and Sarah F. Sisson were different names; that the bank had no funds to the credit of the former on its books, and in good faith and with no knowledge or notice that the person intended to be sued was Sarah F. Sisson, had lawfully paid over to her the money which belonged to her. In the Michigan case a man had been garnished as the debtor of John C. Davis, when in fact he owed Jonathan C. Davis. Prior to the judgment the latter had assigned the debt to Graham who was not aware of the garnishment proceeding and paid full value for the claim. On these facts it was held the proceeding could not be amended, as against Graham, to show the true name of the party sued.

This proceeding for priority was taken under a section of the statutes that says where the same property is attached in several actions against the same defendant, the court may settle all controversies which may arise between the plaintiffs in relation to the property and the priority, good faith, force and effect of the different attachments, and may dissolve any attachment, partially or wholly, or postpone it to another, or make such order in the premises as right and justice may require; further providing that if the actions are in different courts of co-ordinate jurisdiction, such controversies shall be determined by the court out of which the first attachment writ was issued. The statute

breathes the spirit of equity, its policy is to promote right and justice, and that policy would be defeated by postponing respondent's lien to appellant's, unless respondent's levy was a nullity, which, as we have seen, was not so.

The judgment is affirmed. All concur.

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**WILLIAM GODFREY et al., Respondents, v. DORCAS  
M. HAMPTON, Appellant.**

St. Louis Court of Appeals, April 19, 1910.

1. **BUILDING RESTRICTIONS: Construction: Whether Building Is "Flat" Is Question of Fact.** The word "flat" in a building restrictive covenant, prohibiting the erection of flats or tenement houses, has no technical meaning, and, where the testimony is conflicting as to whether a building is a flat or not, the question is one of fact.
2. ———: ———. The court, in construing restrictive covenants in a deed, should keep in mind the purpose to be achieved by the covenants.
3. ———: ———: **Erection of Flats.** The purpose of a restrictive covenant in deeds of lots abutting on a street, prohibiting the erection of flats or tenement houses, is to prevent a house from being used by more than one family, each living by itself on different floors, fitted up separately for housekeeping; and a construction of the covenant which will permit a two-story dwelling arranged for the use of two families, each keeping house by means of fixed conveniences on each floor, and each using a common front entrance and each having separate entrances in the rear, will defeat the object thereof.
4. ———: ———: ———: **Evidence Held to Support Court's Finding.** In an action to restrain a violation of a restrictive covenant prohibiting the erection of flats, evidence held to sustain the finding of the court that a certain scheme of improvement projected by defendant would convert her building into one of the character known as "flats," and therefore would violate the covenant.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm, Judge.*

**AFFIRMED.**

*Paul V. Janis* for appellant.

(1) If the grantor desired to restrict the use of the lot for dwelling purposes to a single family, apt words for that purpose could have been used. A restriction will not be extended by implication to some other matter not within the words of the provision. *Pank v. Eaton*, 115 Mo. App. 171; *Sanders v. Dixon*, 114 Mo. App. 229; 1 *Jones on Real Property*, p. 601, sec. 735.

(2) The court will not create a restriction where none was imposed. The law prefers that the use of land in any lawful mode shall be unhampered by restrictive covenants, and therefore courts decline to extend a stipulation limiting the use, beyond the clear meaning of the instrument. *Sanders v. Dixon*, 114 Mo. App. 171; *Grafton v. Muir*, 130 N. Y. App. 470. (3) In an equity case the appellate court defers somewhat to the chancellor's findings; but if his findings and judgment are not sustained by the evidence and law the court will proceed to make its own findings and enter judgment as equity and justice require. *Givens v. Ott*, 222 Mo. 395.

*E. C. Slevin* for respondents.

(1) Restrictions are to be fairly and reasonably interpreted according to their apparent purpose of protection or advantage intended by the parties. 1 *Jones on Real Property*, p. 601, sec. 735; *Sanders v. Dixon*, 114 Mo. App. 229. (2) A tenement is "a building, the different rooms or parts of which are let for residence purposes by the possessor to others, as distinct tenants, so that each tenant, as to the room or rooms occupied by him, would sustain to the common landlord the same relation that the tenant occupying a whole house would to his landlord." *Am. and Eng. Ency.* (2 Ed.), "Tenement"; *Musgrave v. Sherwood* (N. Y.), 53 Hon. Prac. 311.

GOODE, J.—Defendant Dorcas M. Hampton owns the east 35 feet of lot 5, block 2994 of the city of St. Louis, fronting 35 feet on the north line of Maple avenue, having acquired the property by deed dated October 6, 1908, from Nettie Lippe. The property has on it a two-story dwelling house with a basement, and is number 5221 Maple avenue. The plaintiffs own lots on which, in the same vicinity and on the same thoroughfare, stand their homes. The lot of defendant Hampton was formerly owned by E. G. Butler and others as tenants in common and was by them conveyed on June 8, 1896, to Edward J. Kirby, by deeds filed of record and containing the following covenants:

"This conveyance is made by the said parties of the first part and accepted by the said party of the second part, subject to the following conditions, viz.:

"1st. No building or fence made of lumber shall be erected within twenty feet of the north line of said Maple avenue.

"2d. No building shall be erected on said land which will cost less than \$4000.00, nor shall there be erected more than one building on said lot.

"3d. No building shall be erected on said land for business purposes or of the character known as flats, or tenement houses.

"4th. No store, saloon or livery stable shall be maintained or conducted on said land.

"5th. The foregoing conditions to remain in force for twenty-five years and from and after the 1st day of March, 1892."

The conveyance under which plaintiffs hold title contain the same covenants recited from defendant Hampton's deed. Shortly after she acquired her house and lot, she made a contract with defendant Vornholt, who is a builder, to make certain changes in the house so as to adapt it for the occupancy of two families, one to reside on the first and the other on the second floor. The house is in the style known as Queen Anne, has a

single entrance in front, a reception hall and open stairway ascending to the second floor, a stairway leading from a rear hall to the second floor; at the rear of the house are two porches, one at the first and one at the second floor. Defendant, who has no family, intended to arrange the building so she could let the second story to a married couple without children, and the changes she contracted for and which were in progress when the present action was instituted were the installation of a bath and toilet on the first floor, putting an additional door bell at the front entrance to communicate with the second floor, placing a separate electric meter on the second floor and a sink and boiler in the rear room of that floor, enlarging the two rear porches, connecting them with a stairway extending from the second story porch to the floor of the first-story porch, and converting a window in the rear of the second story into a door which would communicate with the second-story porch. While this work was in progress the plaintiffs sued out a temporary writ of injunction to check it, alleging it was a violation of the covenants in the deed in that it was intended to and was changing the house into a flat building. The allegation is that defendant Hampton had entered into a contract with defendant Vorholt "for an alteration or change of said dwelling house into two separate and distinct dwelling houses superimposed one upon the other of the character known as flats." There was no proof made that plaintiff intended to make two front entrances or to separate the front stairway leading to the second floor from the hall which leads into the rooms on the first floor; and for this reason, mainly, it is contended she was not converting the house into flats and hence was not proceeding in violation of any covenant in her deed. The court below took the testimony of experts like the building inspector of the city of St. Louis and builders and real estate agents as to what would be a flat or tenement house and their testimony was highly contradictory;



some of the witnesses insisting no building can be properly designated as a flat unless it has two front entrances, or at least a front vestibule shut off from the rest of the building except passages or stairways leading from it to the different parts. Otherwise stated, the testimony of these witnesses is to this effect: If a house is so constructed that a person who enters it from the front passes into a hallway like the one in question, from which the downstairs rooms open and a stairway leads to the upper rooms, it is not a flat, even though the two floors are fitted up for and occupied by distinct families. Other witnesses did not entirely coincide with this view, one of them saying that generally there was no communication between the upstairs and the downstairs of a flat; but saying also the distinctive feature of a flat was that it contained independent dwellings, one above the other, and if a building was made to conform to that distinction it would be none the less a flat from having a reception hall in the front of the building through which access was gained to the upper floor. Another witness said a flat was a building occupied by two families or more, especially adapted and arranged so one would live apart from the other; that it was essential to have an entrance to each particular floor; "it may be on the side, some in the rear, some in the front; . . . that the great majority of flats were so arranged as to have two front entrances, but lately many houses had been converted into flats by providing for an entrance on the side, if it could not be done in the front, and if a house was arranged in that manner, it was a flat." This witness said further a flat was supposed to be arranged so two families could reside in a house, each family having a separate entrance and one family would not come in contact with the other. This witness was asked and answered as follows:

"Q. That is just what I am getting at. Then we will take a building that has one front entrance; one

common reception hall; you can enter from the reception hall into the parlor, the dining room and go straight back to the kitchen; one staircase leading from that reception hall up to the second floor, so that all parties coming into that house going to the second floor would be able the minute they got in to go into any of these rooms they desired; what would you call that? A. I would call it a flat.

"Q. What is the difference from an ordinary residence? A. A private residence is for one family in its construction."

The word "flat" is thus defined in dictionaries:

"A floor, loft or story in a building; especially a floor which forms a complete residence in itself. Residence flats of the better class are, in the United States, often called apartments. A building divided into flats." Webster's New International Dictionary.

"A floor or portion of a floor; especially one divided into rooms and fitted for the occupancy of a single family; apartment." Standard Dictionary.

"Tenement: A room or more usually a set of rooms; one of several of the same character designed for the occupancy of a family." Standard Dictionary.

We are not aware that the word "flat" has a technical legal meaning so a court can pronounce absolutely one way or the other as to whether a building is a flat or not. No doubt testimony might be taken which so conclusively showed the truth about a building in controversy as to compel a ruling one way or the other. But where the testimony is contradictory, as in the case at bar, the question would seem to be one of fact. Of course the purpose to be achieved by the restrictive covenant should be kept in mind, and looking at the covenant before us, we incline to hold it was inserted in the deeds to the lot in question and other lots in the vicinity, to prevent plural occupancies by families of the houses on the street; that is to say, to prevent the houses from being used by more than one family,

each living to itself on different floors fitted up separately for housekeeping. This purpose to prevent plural occupancy in the sense stated, is suggested by there being a covenant against tenement houses as well as one against flats. A construction of the covenants which would make them tolerate a house arranged as the one in question was meant to be, and for the use of two families, each keeping house for itself by means of fixed conveniences put on both floors, merely because there will be a common front entrance, would defeat the object of the covenant. There were separate entrances in the rear and a part of the plan of improvement was to turn an upstairs window into a door opening onto the rear upper porch, through which the family living upstairs would have access to a stairway leading from the upper porch to the yard. We think a building of that character would cause all the mischief intended to be prevented by the covenant, would depreciate the value of the property and diminish the attractiveness of the neighborhood as a place of residence. In *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577, the authorities on this subject were reviewed, though none of them is exactly in point in the present case. See also *Pank v. Eaton*, 115 Mo. App. 171, 89 S. W. 586. We hold that on the evidence the court below, as trier of the facts, might find the scheme of improvement projected by defendant Hampton would convert her building into one of the character known as flats, and therefore would violate the covenant.

The judgment is affirmed. All concur.

**GEORGIANA BLAND, Administratrix of T. L.  
BLAND, Deceased, Appellant, v. R. L. ROBINSON  
et al., Respondents.**

**St. Louis Court of Appeals. Argued and Submitted March 7, 1910.  
Opinion Filed April 19, 1910.**

- 1. ATTORNEY AND CLIENT: Attorney's Lien: Lien Held Not to Attach: Sufficiency of Notice.** Where a distributee of an estate being administered entered into a contract with an attorney, by which he was to be paid a percentage of the amount recovered in probate proceedings, which contract was filed in the probate court, the "Attorney's Lien Law" (Acts 1901, page 46), has no application in an action to recover a fee, under said contract, as against the administrator of the estate and the purchaser of such distributee's interest; and moreover the attorney did not bring himself within the provisions of that statute by serving the notice required by it, the only attempt to give notice being the filing of the contract in the probate court.
- 2. ASSIGNMENT: Partial Assignment Without Assent of Debtor: Equity.** Equity will not enforce a claim based upon a partial assignment of the fund, where the debtor has not assented to the assignment.

**Appeal from St. Louis City Circuit Court.—Hon.  
Wm. M. Kinsey, Judge.**

**AFFIRMED.**

*T. L. Bland pro se.*

(1) The plaintiff had a lien on Mrs. Ellson's cause of action from the time of his employment, and this lien continued until it was merged in the judgment—the formal finding of the court of the amount of her interest in the estate of G. T. Dunn, deceased, and no notice of this lien was required to be served on any person. The filing of the same with the clerk of probate court imparted notice. It was fixed by law. Secs. 1 and 2, Attorney's Lien Act, Session Laws 1901, p. 46. And the plaintiff could not "be required to reduce her

claim into verdict or judgment, in order that the attorney may maintain a suit against the defendants. *Yonge v. Transit Co.*, 109 App. 245; *Taylor v. Transit Co.*, 198 Mo. 722; *O'Connor v. Transit Co.*, 198 Mo. 626; *Curtis v. Railroad*, 118 Mo. App. 341. (2) The agreement with Bland to pay him fifteen per cent of the total sum awarded by the court to Mrs. Ellson, together with his proper disbursements and expenses incurred, operated as an equitable assignment of her interest in the fund actually adjudged to her, *pro tanto*. The contract was on file with the files in the case, in the probate court, at Troy, Lincoln county, Missouri. This assignment of an interest in her claim, which ripened into a judgment, was prior, in point of time, to the alleged assignment of her interest or claim by Mrs. Ellson to Murphy. *Prior est tempori portior est de jure*. If Murphy gets anything it must legally come to him only after Bland has his fifteen per cent of the whole sum recovered, with his proper disbursements, and the administrator (Robinson) is liable for his failure to pay the money over to the right party. *Huenkamp v. Borgmier*, 32 Mo. 569; 18 Cyc. Law and Proc., p. 654. The assignee of an interest in the estate of a deceased person which is in process of administration in the probate court, does not acquire title to any specific property by the assignment, but merely the right to such property, or funds, as shall be awarded to the assignor, in the final distribution of the estate. *McPherson v. Trust Co.*, — Mo. —.

*R. P. & C. B. Williams* for respondents.

(1) Under the facts in this case, no lien can arise under and by virtue of the attorney's lien act. *Yonge v. Transit Co.*, 109 Mo. App. 243; *Taylor v. Transit Co.*, 108 Mo. 722; *O'Connor v. Transit Co.*, 198 Mo. 626; *Curtis v. Railroad*, 118 Mo. App. 343. (2) The contract in question cannot operate as an equitable assign-

ment. Kelley v. Newman, 79 Ill. App. 285; Burnett v. Crandall, 63 Mo. 416; Hargett v. McCadden, 107 Ga. 773; Tane v. Shankland, 110 Iowa 525; Gillette v. Murphy, 7 Okla. 91. (3) Both at law and in equity a portion of a debt, claim, or judgment is incapable of assignment in the absence of the debtor's consent. Burnett v. Crandall, 63 Mo. 413; Love v. Fairfield, 13 Mo. 300; Alexander v. Railroad, 54 Mo. App. 75; Loomis v. Robertson, 76 Mo. 491; Beardslee v. Morgner, 73 Mo. 22.

REYNOLDS, P. J.—The appellant's intestate, hereafter referred to as plaintiff, commenced his action against the defendants, by filing a petition in which he averred that he was a duly licensed and practicing attorney; that Dora Ellson, one of the defendants, is an heir-at-law of one George T. Dunn, who died intestate in Lincoln county, this State, in 1905, and as such heir she was entitled to inherit a two-elevenths interest or share in decedent's estate; that the defendant Robinson, after the death of George T. Dunn, was duly appointed administrator of the estate of Dunn by the probate court of Lincoln county; that he qualified as such administrator and made his final report as such administrator on the 3rd of February, 1908, upon which report the judge of the probate court made an order of final distribution of the estate of the said Dunn; that in January, 1906, the defendant Dora Ellson had made and entered into an agreement in writing with plaintiff wherein, in consideration of the legal service to be rendered Mrs. Ellson by plaintiff and the agreement of plaintiff to look after her interests in the estate and represent her in all matters pertaining thereto as heir of the estate, she agreed and authorized plaintiff, as such attorney at law, to collect her interest or share in the estate when the same was to be payable on distribution, to receipt therefor in her name and stead, and further agreed to pay plaintiff the sum of fifteen per cent of

whatever amount or share or interest in the estate might be upon final distribution as compensation for the services rendered and to be rendered by plaintiff, and further agreed with him that she would pay all costs, expenses and disbursements made by him in looking after and attending to her interest in the estate as well as his expense in his trips to and from the city of St. Louis to Troy, in Lincoln county, and further agreed with plaintiff that she would not sell or otherwise dispose of her interest or share in the estate without his consent; that the agreement above mentioned was duly placed on file with the judge of the probate court of Lincoln county on the 3d of March, 1906, and became a part of the files and records of the estate; that the agreement imparted full and complete notice to all parties in interest or that might subsequently become interested in the estate or who might become interested in the share of Dora Ellson and was from that time full and complete notice to the public; that afterwards about the 20th of March, 1906, Dora Ellson sold and assigned her interest and share in the estate to the defendant, John H. Murphy, for the purported consideration of one thousand dollars; that the sale to Murphy was without the knowledge or consent of plaintiff thereto; that Murphy bought or took the assignment of Mrs. Ellson's interest with full knowledge of the existence of the contract between plaintiff and Mrs. Ellson and with full knowledge of the existence of his claim and lien on her interest in the estate; that the defendant Robinson, as administrator of the estate, has made or will make payment of Mrs. Ellson's interest to defendant Murphy, in direct violation of the agreement between plaintiff and defendant Dora Ellson, and that Robinson, as administrator, had knowledge of the existence of the agreement between Mrs. Ellson and plaintiff; that the interest of Mrs. Ellson in the estate at the time of making the

order of distribution was \$1895.95, fifteen per cent of which, under the agreement between plaintiff and Mrs. Ellson, amounted to \$284.37, which it is averred is justly due and owing plaintiff; that the latter had paid out and expended \$11.85 in railroad fare, hotel expenses and other incidental expenses in going from the city of St. Louis to Troy and returning therefrom, in discharge of his duties in attending to Mrs. Ellson's interest in the estate, making the total amount due him \$296.22, no part of which has been paid; that the defendants Murphy and Robinson are brothers-in-law and "have fraudulently conspired together for the purpose of defeating the said plaintiff's rights, and for the purpose of defeating plaintiff's lien and claim against the said Dora Ellson's interest or share in and to the said estate." The prayer is for judgment against the defendants for the sum of \$296.22, with interest from the 3d of February, 1908, and for costs, "and for such other and further relief as to this court may seem just and proper, for which he will ever pray."

Defendants Murphy and Robinson demurred to the petition on the ground that the facts set forth in it are insufficient to constitute a cause of action. The court sustained these demurrers and plaintiff, standing on the petition, final judgment went in favor of the defendants Robinson and Murphy, the plaintiff having in the meantime dismissed as to defendant Dora Ellson. From this judgment plaintiff duly appealed to this court and pending the appeal plaintiff dying, his widow, taking out letters of administration, was duly substituted as plaintiff and appellant.

The errors assigned in this court are to the action of the court in sustaining the demurrers of defendants Murphy and Robinson. Counsel argue this case as if it arose under our statute, Acts 1901, p. 46, applicable to the lien of an attorney for his fees. We do not think it comes under that; at all events, plaintiff did not



bring himself within its provisions, by serving the notice required by that statute.

As strong as is the case made by the petition, we are compelled to hold that on the facts therein stated, this case falls within the rule announced in *Burnett v. Crandall et al.*, 63 Mo. 410. The case made by plaintiff is that of an assignment of a part of a claim without the assent of the debtor. In the *Burnett* case, *supra*, our Supreme Court recognizes the rule that even equity will not enforce a claim based upon a partial assignment of the fund, the debtor not having assented to the assignment.

The judgment of the circuit court sustaining the demurrers must be and is affirmed. All concur.

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**J. L. SPRAGUE, Defendant in Error, v. LILLIAN  
A. MATHIAS, Plaintiff in Error.**

**St. Louis Court of Appeals. Argued and Submitted April 7, 1910.  
Opinion Filed April 19, 1910.**

- 1. APPELLATE PRACTICE: Abstract: Sufficiency of.** Under court rules 14 and 15, providing that, where a case is brought up by a full written transcript, the plaintiff in error shall deliver a copy of his abstract of the record to defendant in error and file copies with the clerk, and that it shall contain a complete index and must set forth so much of the record as is necessary to a complete understanding of all questions presented for decision—that is an abstract of the record proper and all matters of exception, a statement containing no reference as to when a bill of exceptions was filed, no exceptions to rulings on evidence, or on instructions, or to overruling a motion for new trial, save an exception to overruling the demurrer to the evidence at the close of plaintiff's case, and no summary of pleadings, except a reference to some of the counts in the petition, following which is a synopsis of the testimony for plaintiff and defendant, and this followed by a heading "Assignment of Errors" and then by the heading "Argument, Points and Authorities," is not an abstract such as is required by said rules.

2. ———: **Necessity of Exception to Overruling of Motion for New Trial.** Where no exception is saved to the overruling of a motion for a new trial, the appellate court will not review proceedings at the trial nor notice any errors not appearing in the record proper.
3. ———: **Non-Compliance with Rules: Affirmance of Judgment.** Where, under court rules 14 and 15, there is no abstract of the record, the absence of which would authorize the dismissal of a writ of error, and in addition there is a failure to except to the overruling of the motion for a new trial, and the judgment is sustained by the petition and is in accordance with the issues, the judgment will be affirmed.

Error to St. Louis County Circuit Court.—*Hon. Jno. W. McElhinney, Judge.*

**AFFIRMED.**

*P. P. Mason* for appellant.

*Jos. Barton* for respondent.

REYNOLDS, P. J.—This case is here on a full typewritten transcript, filed in this court August 30, 1909, and is on the April, 1910, docket of our court.

Rule 32 of our court makes the rules as amended July 20, 1909, take effect August 15, 1909, provided they shall not apply to cases on the docket for October November and December, 1909. Hence those rules govern the appeal in this case.

Rule 14 provides that in all cases where a complete written or printed transcript is brought to this court in the first instance, "the appellant (or plaintiff in error [see Rule 2]) shall make and deliver to respondent a copy of his abstract of the record at least 30 days before the day on which the cause is set for hearing and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing." This is substantially section 813, Revised Statutes 1899, in so far as it requires an ab-

abstract when the case is brought up on full transcript. Rule 15 prescribes the requisites of an abstract. Among other things it must have a complete index, and must set forth so much of the record as is necessary to a full and complete understanding of all questions presented to the court for decision. That involves setting out all jurisdictional matters—an abstract of the record proper and of all matters of exception. Rule 21 provides that on failure to comply with rules 12, 14, 15, 16 and 18, the court will dismiss the appeal or writ of error or at the option of the respondent continue the cause. In the case before us there is no abstract whatever on file. There is what is labeled "Statement, Points and Authorities for Respondent." That statement is in no sense an abstract. No reference is made in it as to when a bill of exceptions was filed, if that was ever done; not an exception noted to rulings on evidence, or on instructions or to overruling a motion for new trial, save an exception to overruling the demurrer to the evidence at close of plaintiff's case and at close of all the evidence. There is not even a summary of the pleadings, the statement referring to them thus: "There are three counts in the petition: The first based on an alleged verbal contract to pay \$1125.00. Tr. 2. . . . The third count is based on *quantum meruit* (sic), and asks for judgment for \$457.85. Tr. 5." Then follows these entries: "Defendant's motion for new trial Tr. 19, duly filed, was overruled, Tr. 20, appeal was granted to plaintiff to this court, Tr. 21. Appeal perfected. *Bill of Exceptions.* At close of plaintiff's case, defendant offered an instruction in the nature of a demurrer to the evidence, Tr. 77, which was overruled, and to which defendant excepted at the time, Tr 77." Following this is a synopsis of the testimony for plaintiff and defendant. Following that is what is headed "Assignment of Errors." Six errors are assigned and then follows: "Argument, Points and Authorities," and this is

duly signed by counsel. The respondent's counsel invokes our rules as against this, claiming it is not an abstract. Even if counsel did not appeal to our rules, we would be obliged to apply them when the defects in this so-called statement are so glaring. The absence of an abstract would ordinarily bar us from going to the transcript ourselves. Out of the desire, however, to do no injustice, we have looked into the transcript, a thing the Supreme Court has declared it will not do, far enough to see whether an exception had been saved to the action of the trial court in overruling the motion for a new trial and was present in the transcript but had been omitted inadvertently from the statement. There is no entry showing any such exception. If no exception is saved to the overruling of a motion for a new trial we cannot review either proceedings at the trial, nor notice any errors appearing in the record proper. This case is here therefore without any sufficient compliance whatever with rules 14 and 15. Our Supreme Court, construing a rule identical with our Rule 14, in *Whiting v. Big River Lead Co.*, 195 Mo. 509, 92 S. W. 883, and in a case very like this, dismissed the appeal, holding that the abstract cannot be dispensed with. They accordingly dismissed the appeal, as we might this writ of error. In this case, however, we have more than failure to comply with a rule, we have a failure to except to the overruling of the motion for a new trial. In such case, no errors at the trial can be noticed and if the judgment is sustained by the petition, and is in accordance with the issues, it is not subject to arrest for errors, and we must affirm it. Finding no error of record and there being no pretense that the petition fails to state a good cause of action, the judgment of the circuit court is affirmed. All concur.

**CAL HIRSCH & SONS IRON & RAIL COMPANY,  
Appellant, v. PARAGOULD & MEMPHIS RAIL-  
ROAD COMPANY, Respondent.**

**St. Louis Court of Appeals. Argued and Submitted March 14, 1910.  
Opinion Filed April 19, 1910.**

- 1. CONTRACTS: Mutuality: Unilateral Contracts.** To make a contract "unilateral," and thereby void, there must be no mutuality of obligation, and only one party thereto must be bound thereby.
- 2. ———: ———.** For a contract to be "mutual," an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party can be bound, unless both are bound.
- 3. ———: ———: Contract Held Void.** A memorandum of sale between an iron company and a railroad company, reciting that the former obligated itself to furnish such material of a certain kind as it might have, and that such material was subject to the inspection of the railroad company, is unilateral.

**Appeal from St. Louis City Circuit Court.—Hon. James  
W. Withrow, Judge.**

**AFFIRMED.**

*Louis L. Boehmen and A. L. Hirsch for appellant.*

(1) The contract is mutually binding on both parties. *Laclede Const. Co. v. Iron Works*, 169 Mo. 137; *Williams v. Railroad*, 112 Mo. 463. (2) The court erred in excluding the contract from evidence in the case. See authorities under point 1. (3) The ruling of the court in excluding the contract from evidence, after it had been shown to have been duly executed by both parties in the case, precluded appellant from establishing its case and the nonsuit was therefore involuntary. *Dowd v. Winters*, 20 Mo. 361; *Sachse v. Clingsmith*, 97 Mo. 406. (4) The appellate court will not refuse

to set aside a nonsuit taken upon the rejection of material evidence necessary to plaintiff's recovery, because the record does not show that the plaintiff was prepared with proof upon the other material facts in the case, or because the evidence may possibly have been rejected for the reason that it was offered out of the order of time prescribed by the court in trying the cause. *Dowd v. Winters*, 20 Mo. 361; *Sachse v. Clingsmith*, 97 Mo. 406. (5) If the agreement was unilateral in the first instance yet it became binding when appellant notified respondent to inspect rails as alleged in the petition. *Nicholsen v. Plaster Co.*, 122 S. W. Adv. Sheets No. 4, p. 773; *Typewriter Co. v. Realty Co.*, 220 Mo. 522. (6) The appellant having been forced by the court to take an involuntary nonsuit before it had introduced any but formal testimony, the presumption must be indulged that appellant was able to prove all the material allegations of its petition. See authorities, *supra*, under point 4. (7) A contract should be construed so as to uphold rather than to defeat it. *Belch v. Miller*, 32 Mo. App. 387; (8) Ambiguity in a contract does not necessarily invalidate it as the ambiguity may be removed by the interpretation of the parties shown by their acts under it and in other ways. *Saddlery Co. v. Kingman*, 42 Mo. App. 208; *J. K. Armsby v. Eckerly*, 42 Mo. App. 299. (9) The contract in this case does not give the vendor the option to deliver or not as it may desire, nor does it provide that the purchaser may take such of the rails as it may want or desire. (10) In a contract of sale subject to inspection it is implied that the inspection is to be reasonable. The party cannot arbitrarily reject without cause and neither can it avoid the contract by refusing to inspect. *Dinsmore v. Livingston County*, 60 Mo. 241; *Neeman v. Donoghue*, 50 Mo. 493; *Williams v. Railroad*, 112 Mo. 465; *Vought v. Williams*, 120 N. Y. 253.

*Block & Sullivan* for respondent.

The contract sued on was lacking in mutuality. (a) It laid no binding obligation on appellant to furnish rails. *Campbell v. American, etc., Co.* 117 Mo. App. 19, and cases cited; *Cold Blast, etc., Co. v. Kansas, etc., Co.*, 114 Fed. 77, and cases cited; *Bailey v. Austin*, 19 Minn. 537. (b) By the terms of the contract, respondent was made the sole judge of any rail which might be offered. *McCormick v. Finch*, 100 Mo. App. 644, and cases cited. (c) And was not bound to take rail if offered. *Matador, etc., Co. v. White*, 82 Tex. 478.

REYNOLDS, P. J.—Plaintiff brought suit against the defendant on a written contract for the sale of 308 tons (2240 pounds per ton) of relaying T rails, together with splice bars, at a price of \$29 per ton gross, to be delivered f. o. b. cars at St. Louis, Missouri, or East St. Louis, Illinois. It is averred in the petition, that the defendant had broken the contract to the damage of plaintiff in the sum of fifteen hundred dollars, for which he prays judgment, together with costs, and it is further averred that plaintiff is now ready and willing to deliver said 308 gross tons of rails as bargained and sold to the defendant at the agreed price of twenty-nine dollars per gross ton, upon payment of its sight draft with bills of lading attached as agreed. “Wherefore plaintiff prays judgment for the agreed price of said rails, as aforesaid, namely the sum of \$8932 and for its costs.”

Defendant answered, first, by a plea to the jurisdiction, denying that either of the alleged causes of action declared on in the plaintiff's petition accrued in the city of St. Louis, and further answering to the merits of the petition, defendant denied each and every allegation thereof.

The cause coming on for trial, plaintiff offered the contract sued on in evidence. Defendant's counsel admitted that it was signed by the president of the defendant company, and then objected to the contract

because it was lacking in mutuality in two aspects: It states that plaintiff is to sell such rails only as it may have and does not obligate it to have any, and it provides that the defendant may only buy such rails of the plaintiff as the defendant may want.

At the commencement of the trial and before the jury was sworn, defendant moved that plaintiff be required to elect whether it would stand on the count for damages or on the count for the purchase price of the rails and splice bars. The motion was sustained and plaintiff elected to stand on the count for damages, that is, the count praying judgment for \$1500 and costs, and dismissed as to the count for the recovery of the purchase price of the rails and splice bars, no exception being taken or saved by plaintiff to the action of the court in requiring it to elect.

The contract relied on and offered in evidence is as follows:

"St. Louis, Mo., 6-17-07.

"Paragould & Memphis Railroad Co., Decatur, Ind.

"Ex. A. J. F. A. Jan. 14, '09.

"Dear Sirs:—This will confirm sale made to your company as per conversation with your Mr. J. W. Vail of 308 tons of about 56-lb. relaying rail at twenty-nine (\$29.00) dollars per gross ton f. o. b. cars St. Louis, or East St. Louis our option. The above are subject to your inspection at point of shipment. Of course, it being understood that we are only obligated to ship such relaying rail as we may have and in case our rail do not pass your inspection we are not obligated to replace them. Terms sight draft bill of lading attached. Shipment to be made within ninety (90) days. We also agree to furnish whatever splice bars we may have for the rail to be weighed in at the same price as the rail. It being further understood, if we have ready for inspection 100 tons they are to be inspected by your company before July first, the

Draw on Cardwell, Mo.



balance to be inspected between August first and September first, 1907. If we desire them to be inspected previous to this time we will pay whatever expense you are put to—after the first inspection.

“This being accepted by both parties will constitute contract between us.

“Yours Truly,

“Cal Hirsch & Sons Iron & Rail Co.,

“L. B. Hirsch,

“V. P. & G. M.

“Accepted:—

“P. & M. R. R.,

“Jno. W. Vail, Pres.”

The court sustained the objection, to which plaintiff, excepting, took a nonsuit with leave to move to set the same aside, which latter motion was duly filed, overruled and exception saved and the case brought here on appeal by plaintiff.

Bouvier, in his Law Dictionary (Rawle's Revision), quotes Professor Langdell (Langdell, Sum. Cont., sec. 183), as defining a unilateral contract to be “every binding promise not in consideration of another promise.”

Our Supreme Court, in Laclede Construction Co. v. Tudor Iron Works, 169 Mo. 137, 1. c. 149, 69 S. W. 384, has said: “To make a contract unilateral and therefore void, it is essential that there should be no mutuality of obligation; that only one party thereto should be bound thereby.” Further along in the same case, at page 151, it is said, quoting from 7 Am. and Eng. Ency. of Law, that unilateral contracts mean contracts that lack mutuality. “Mutuality of contracts means that an obligation must rest upon each party to do or permit to be done something in consideration of an act or promise of the other, that is, neither party is bound

unless both are bound." The contract before the court in the Laclede Construction Company case is in many respects very like the contract here in suit, and again referring to that case, at page 151, our Supreme Court has said, that measured by the legal rule, while the so-called contract may have properly been classified as a unilateral contract originally, it had ripened into a full and binding contract, by reason of correspondence between the parties after it had been proposed and accepted. The court held that in point of fact the letters in evidence in the case were ample in themselves to have constituted a valid contract except as to the amounts and prices of the articles to be furnished and paid for, and that these matters could be supplied by reference to the paper or memorandum set out as the contract. The learned counsel for the appellant in the case at bar cite and rely upon this Laclede Construction Company case, but it is urged by opposing counsel that they lose sight of the fact that instead of the words "as we may have," as used in the contract before us, the contract or the paper relied on as a contract in the Laclede Construction Company case used the word "need;" that it was a sale and purchase of such rails and splice bars as the plaintiff "should need" within a given time; that how much they might need was a matter of easy ascertainment from the character of the work, but how much the plaintiff "may have" was beyond accurate determination. That, however, is more a quibble on words than an interpretation of the contract, and we do not consider it a determining factor. The fatal and radical difference between the Laclede Construction Company case and the case at bar is that here there is no averment in the petition to in any way indicate any contract other than the one offered in evidence. So far from the petition indicating that there was any other contract or any act by defendant admitting or recognizing the existence of a contract between the parties, it is distinctly averred that when the defendant was notified to send an in-

spector to inspect the rails, and notified that the plaintiff was ready to deliver rails which would meet the requirements of the contract, that "defendant refused and ignored said requests, and refused at St. Louis, Missouri, to inspect or accept said rails, and at St. Louis, Missouri, refused to perform said contract." This, in effect, is an averment of repudiation of a contract. Nor was there any offer at the trial, in connection with the offer of the contract in evidence, of any testimony to show any acts, correspondence or facts which would convert this memorandum into a valid contract, mutually obligatory upon the parties. We therefore hold that the Laclede Construction Company case is controlling authority against the position of the plaintiff, and that under the definitions of a unilateral contract, the contract or memorandum offered in this case was not a mutual but a unilateral one, and the objection to its introduction in evidence properly sustained.

The judgment of the circuit court in overruling the application of the plaintiff for leave to set aside the nonsuit was correct, and its judgment in favor of the defendant below, respondent here, is affirmed. All concur.

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**LIZZIE WALSH, Appellant, v. SOVEREIGN CAMP  
OF THE WOODMEN OF THE WORLD, Defendant;  
ST. LOUIS UNION TRUST COMPANY,  
Respondent.**

**St. Louis Court of Appeals. Agrued and Submitted March 15, 1910.  
Opinion Filed April 19, 1910.**

- 1. APPELLATE PRACTICE: Conclusiveness of Court's Finding Under Conflicting Evidence.** The findings of the chancellor on conflicting testimony will ordinarily be followed on appeal, though the court on appeal is not bound thereby.
- 2. LIFE INSURANCE: Action on Policy: Interpleaders: Equitable Proceeding.** Where a benefit order, sued on a certificate by the beneficiary named therein, pleaded that the member

attempted to change the beneficiary by making the certificate payable to his minor children instead of his wife, and asked that the wife named as beneficiary in the original certificate and the curator of the children interplead, and the wife averred that at the time of the attempted change the member was not of sound mind, and the curator claimed the certificate by virtue of the attempted change of beneficiaries, the cause became a suit in equity, and the controversy should be determined according to equitable principles.

3. **CONTRACTS: Construction: Effectuating Intent: Equity.** Where the intention of the parties to a contract is clearly manifest or can be ascertained with reasonable certainty, equity will carry it out, though the form of its expression may be defective, either in non-compliance with some specific rules or even conditions of the law itself.
4. **LIFE INSURANCE: Fraternal Beneficiary Association: Change of Beneficiary: Non-conformity to Rules.** The rules of a beneficiary order required that the name of the beneficiary should be given in every benefit certificate issued, and that if the member desired to change the beneficiary he could do so by forwarding to the sovereign camp his certificate with a request written thereon, giving the name of the new beneficiary. A member, who did not have the certificate, executed an instrument asking for a change of beneficiaries so as to make the certificate payable to his children, instead of to his wife, and asking for a new certificate. The instrument was sent to the sovereign camp, and it returned the same with the statement that it was necessary that the request for a change of beneficiaries be filled out on the official blank of the order, a copy of which was inclosed. The member died before the instrument from the sovereign camp was received. *Held*, (1) That while the form in which the change of beneficiaries was attempted to be made was not strictly in accordance with the rules of the order, it was substantially as required by them; (2) That equity, as between the original and new beneficiaries, will enforce the intent of the member to make the change of beneficiaries, though death intervened before he could conform to the rules and formally express his intention.
5. ———: ———: ———: ———: **Failure of Order to Object.** The failure of a fraternal beneficiary association to insist on the form required by its rules and by-laws for a change of beneficiaries does not bind parties claiming under the rules of the order.

Appeal from St. Louis City Circuit Court.—*Hon. Robt. M. Foster* and *Hon. Geo. H. Williams*, Judges.

**AFFIRMED.**

*Julius T. Muench* for appellant.

(1) Where the rules of a fraternal beneficial association prescribe a method for a change in the beneficiary, such method is exclusive, and must be strictly followed. *Coleman v. K. of H.*, 18 Mo. App. 189; *Head v. Supreme Council*, 64 Mo. App. 212; *Hoffman v. Grand Lodge*, 73 Mo. App. 77; *Wallace v. Life Assn.*, 80 Mo. App. 102; *Ross v. Gd. Lodge*, 86 Mo. App. 621; *Flowers v. Sovereign Camp*, 90 S. W. 526; *Niblack on Ben. Ins.*, sec. 220; *Bacon on Ben. Soc.*, 307; *Holland v. Taylor*, 111 Ind. 127; 3 Am. and Eng. Ency. of Law (2 Ed.), 993; *Gd. Lodge v. Elsner*, 26 Mo. App. 108; *Legion of Honor v. Smith*, 55 N. J. Eq. 466; *Sanger v. Rothschild*, 123 N. Y. 77; *Mut. Ben. v. Burkhart*, 110 Ind. 189; *Presbyterian Mut. v. Allen*, 106 Ind. 593; *Mut. Ben. Assn. v. Brown*, 33 Fed. Rep. 11. (2) The rights of the parties become fixed at the death of the member, and non-compliance with the prescribed mode of substitution cannot be waived by the association after the member's death. *Keener v. Gd. Lodge A. O. U. W.*, 38 Mo. App. 550; 3 Am. and Eng. Ency. Law (2 Ed.), 998. (3) The original beneficiary has the right to challenge the truthfulness of the affidavit made by the member for the purpose of securing the consent of the association to a change of beneficiary. *Leaf v. Leaf*, 92 Ky. 166; *Ben. Soc. v. Murphy*, 65 N. J. Eq. 60; *Royal Arc. v. Tracy*, 169 Ill. 123. The courts will protect the equities of the natural beneficiary in a benefit certificate, and the equities in this case are all with the widow. *Leaf v. Leaf*, supra; *Catholic Ben. Soc. v. Murphy*, supra; *Gd. Lodge v. O'Malley*, 114 Mo. App. 191, 213 Mo. 269.

*Geo. D. Harris and W. H. & Davis Biggs for respondent.*

(1) It being established that the insured clearly intended to change the beneficiary in his benefit certificate, and he having done all in his power under the circumstances shown in the evidence to make the change according to the regulations of the society, and it being beyond his power to comply literally with the association's by-laws, a court of equity will treat the change as having been legally made. *Gd. Lodge v. O'Malley*, 114 Mo. App. 205, s. c. 213 Mo. 269; *Relief Association v. Strode*, 103 Mo. App. 709; *Hofman v. Gd. Lodge*, 73 Mo. App. 53; *Maccabees v. Altman*, 114 S. W. 1107; *Relief Association v. Tierney*, 116 Mo. App. 447; *Lahey v. Lahey*, 61 L. R. A. 795; *Isgrigg v. Schooley*, 125 Ind. 95; *Tilworth v. Tilworth*, 20 Pac. Rep. (Kas.) 213; *Hale v. Allen*, 75 Miss. 211; *Supreme Conclave v. Capella*, 41 Fed. 1; *Marsh v. Supreme Council*, 149 Mass. 512; *Gd. Lodge v. Child*, 70 Mich. 163; *Nally v. Nally*, 74 Ga. 669; *Association v. Kirgin*, 28 Mo. App. 80; 1 *Bacon Ben. Soc.*, secs. 310, 310a. (2) By paying the money into court the order waived a compliance with its by-laws and regulations. *Hofman v. Gd. Lodge*, supra; *Tilworth v. Tilworth*, supra; *Hanson v. Assn.*, 59 Minn. 123. (3) Mrs. Walsh, having withheld the certificate from the deceased Patrick Walsh, and thereby prevented him from complying with the by-laws of the order in making the change, she should now be estopped from asserting that the by-laws of the order were not complied with in making the change. *Lahey v. Lahey*, 61 L. R. A. (N. Y. Court of App.) 795; *Supreme Conclave v. Capella*, supra; *Gd. Lodge v. Kohler* (Mich. 1895), 63 N. W. Rep. 897; *Jory v. Supreme Council*, 105 Cal. 20. (4) The fact that Mrs. Walsh paid the dues and assessments gives her no claim upon the fund. *Sec. 1417, R. S.* ; *Fisk v. Aid Union*, 11 Atl. Rep. 84.

**STATEMENT.**—One Patrick W. Walsh was a member of the Woodmen of the World and held a beneficiary certificate in that order which made the fund (\$2000) payable at his death to his wife, Lizzie Walsh. Patrick Walsh died at the city of St. Louis on the 5th of December, 1907. He had been sick at intervals and a patient in hospitals in St. Louis at intervals prior to his death, and the certificate showing his membership issued by the Sovereign Camp of Woodmen of the World and designating his wife Lizzie as beneficiary was kept in a bureau drawer in the home, apparently in the custody of the wife, but there is nothing in the record to show that she had ever refused to turn it over to her husband. Her testimony is to the effect that she kept it locked in the bureau drawer with her other papers to keep the children from getting at them and that the key of this drawer lay on the mantel of the room in which the bureau was kept. There was a blank form, apparently printed on the back of this certificate, to be filled up in case the owner of the certificate desired to change the beneficiary. About the end of November, 1907, Patrick Walsh was confined in the City Hospital in St. Louis, sick. On the 29th of November, a Mr. Schulenburg, who was clerk at the time of Sovereign Camp No. 242, Woodmen of the World, of which Patrick Walsh was a member, went to the city hospital with half a dozen friends, apparently to call on Walsh. The hospital authorities only allowed two of them to go up together and Mr. Schulenburg and Mr. Muntzel went up into Walsh's room. Asked what Walsh had said on that occasion as to this benefit certificate, Mr. Schulenburg testified that he didn't hardly know what he said as he was a little bit vindictive at the time, but he said he wanted to give all of the benefit to the child; appeared to be vindictive against his wife; wanted to make the change to his child. Walsh did not have the certificate with him and nothing was done about making a change in the beneficiary that night of the 29th. Schulenburg, answering the request of Walsh,

told him that he would be down the next night to make the change that Walsh wanted. The next night Schulenburg telephoned to a notary to meet him at the hospital that night, that is, November 30th, and they met there. He testifies that he could not find any proper blank that the law required to fill out, so he went down to the hospital that night and had the notary there and they made out a blank form as near as they could make it. As made it is as follows:

"To the Sovereign Camp, Woodmen of the World:

"Whereas, beneficiary certificate Number 47886, issued on the 16th day of December, 1904, payable to my wife, Lizzie Walsh, I hereby desire to change the same to my three children as follows: Thomas W. Walsh, James H. Walsh and John P. Walsh.

"The original being withheld, I hereby take this means of relinquishing same and ask for a new certificate in the names of the above beneficiaries."

Walsh could not write and it was written by the notary. Walsh made his mark, the notary writing his name, and Schulenburg signed as a witness, and thereupon the certificate of the notary that it had been subscribed and sworn to before him as notary on the 30th of November, 1907, by Patrick W. Walsh was attached, the notary affixing his official seal. The reason this was not on a blank provided by the order was, as stated by Mr. Schulenburg, that he had no blanks outside of the certificate and Walsh did not have the certificate there, so that it could not be filled out on the back of the certificate. At the time Walsh said nothing about where the certificate was. The sentence in this affidavit, "the original being withheld," was written in by the notary as what Walsh said at the time. They asked him why he didn't have the certificate but he did not say anything further about it being withheld. Mr. Schulenburg testified that they had tried to fix the paper up in about the same form as the regular one, and that the expression in the affidavit, that the certificate was withheld, was put in



because Walsh did not have it there with him. Asked if he, as secretary, did not know that the change of beneficiary had to be on the back of the certificate, he answered, "It should be done, otherwise—no, it can be done in a different way, on a blank form under oath. We issue oftentimes certificates that are lost or destroyed or stolen, or something else." Didn't have the form with him at the time they wrote this, so they had to make up this form. Asked by the court why he had stated that Walsh appeared to be vindictive toward his wife, he stated that his reason for saying that was that the night before or ten days or so before he (Walsh) had attempted to change the certificate. This was when Walsh and Mr. Schulenburg were at Walsh's house, and he said to Schulenburg, "I want to give her (referring to his wife) fifteen hundred dollars and five hundred dollars to the baby," and that he had done all he could or something of that kind. Schulenburg was asked by the court as to what Walsh had said as to why he changed now from that division of the money, five hundred dollars to the baby and fifteen hundred dollars to his wife, and now wanted to change it by giving all to his three sons and not give his wife anything, and witness answered that he didn't remember that he said anything particular about that; he didn't say anything about it to the notary, no more than that he wanted to make the change; all the notary knew about it was that he wanted to make the change; that he wanted to make it all over to the children, but he did not give any reason for making it to the three children. After the paper had been executed on this night of the 30th of November, Schulenburg, as clerk of the Sovereign Camp, sent it to the Sovereign Camp, Woodmen of the World, at Omaha, Neb. November 30, 1907, the night on which this paper was executed, was Saturday night, but witness was not certain whether he sent it Sunday or Monday. He sent it to the Sovereign Camp at Omaha; put it in an enve-

lope and stamped the envelope and mailed it to headquarters. The notary, Mr. Kredell, testified that when Mr. Schulenburg telephoned him to meet him at the city hospital at 7:30 on the evening of November 30th, he got there about that time, taking his seal with him, and Mr. Schulenburg took him up to Walsh's room, saying Walsh wanted to change his beneficiary. Mr. Kredell then testified as follows in answer to the direction of the court that he tell everything that happened:

"I asked Mr. Walsh what he wanted done, and he told me he wanted to give each one of his children one-third, I think it was; and then I got out a piece of paper, and began to give me the names of the three children who he wanted to have this money in case of his death. And he give me the names, I wrote them down on a piece of paper, and walked out in the hall, and asked one of the nurses if she would give me a piece of paper to write, to make an affidavit. In the meantime, I asked Mr. Schulenburg if he didn't have one of the forms from the head camp, etc. He didn't have any with him. So I told him we would have to do the best we could without it. I walked out in the hall, asked the nurse for a piece of paper, she got me a piece of paper. We sat down and wrote up this affidavit. After we had written it up we went back to the room; I told Mr. Walsh I was ready, read it off to him, and asked him if he could sign. 'No,' he says, he thinks he is a little too weak. I said, you can make a mark? He says, 'Yes.' So he laid in bed, I made the cross and he touched my pen. After that we walked out in the hall. There was no desk in the room. I therefore had to go back in the hall to get something to write on. Went back into the hall, I put my seal on and signed it. Mr. Schulenburg signed it as a witness. I think that was all there was to it."

He further testified that he swore Walsh to the paper. Walsh held up his hand and swore to it after he had read it over to him. Walsh did not say anything and after he had sworn to it, the notary attached his seal and signed his name; heard no other conversation and had no other conversation. When the notary went in and understood what was to be done, as he testified, he asked Walsh where the certificate was and he said he didn't have it; that was all he said about it, except that witness thought he said that his wife had it; had no recollection of Walsh saying anything about why he did not have it or why he did not get it from his wife. Asked by the court why he had put in the words "certificate withheld," he answered that was because Walsh didn't have it in his possession.

To repeat, Patrick Walsh died on the night of the 5th of December. On the 7th, Mr. Schulenburg received a letter from the sovereign clerk of the defendant order, of date December 5, 1907, addressed to him at St. Louis, as follows:

"I return you herewith the statement of P. W. Walsh for duplicate certificate. It is necessary that same be filled out on the official blank of the order, a copy of which is herewith enclosed. This blank should be signed, attested and sworn to and forwarded to this office when the duplicate certificate will be promptly issued.

"Fraternally,

"J. T. YATES, Sovereign Clerk."

This letter was received by Schulenburg December 7, 1907, it being stipulated by counsel at the trial that a letter, properly stamped, deposited in the St. Louis mails, at the city of St. Louis, addressed to the sovereign clerk of the order, at Omaha, Nebraska, would reach its destination within twenty-four hours thereafter.

After the death of Patrick Walsh, the plaintiff, his wife, brought suit against the order to recover the two thousand dollars, claiming it as the beneficiary named in the certificate. The Sovereign Camp appeared and pleaded that the St. Louis Union Trust Company had been appointed curator of the three minor children of Patrick Walsh and claimed the fund by virtue of the paper before set out and depositing the fund in court, asked that the plaintiff and the St. Louis Union Trust Company, as curator, be required to interplead. They accordingly did so, each party claiming it, the widow, Mrs. Walsh by virtue of her name being in the certificate, and the curator by virtue of the paper before referred to, changing the beneficiaries, it also being averred by Mrs. Walsh that at the time of the execution of the paper her husband was not of sound mind. At the trial before the court there was evidence as above. Mrs. Walsh also introduced evidence tending to show that she had paid the money necessary to discharge the bill to the hospital for his treatment there and that to do so she had mortgaged some property which she owned.

The rules of the order were introduced in evidence, those parts of the constitution and by-laws of the order relied upon by plaintiff being the section which provided that one of the objects of the order was to create a fund from which, upon reasonable and satisfactory proof of the death of a member, who has complied with all of the requirements of the order, there should be paid a sum not to exceed three thousand dollars to the person or persons named in the certificate as beneficiary or beneficiaries and that the name or names of the beneficiary or beneficiaries shall be written in every beneficiary cer-

tificate issued; another section providing that if a member desires to change his beneficiary he might do so upon the payment to the sovereign camp of a fee of twenty-five cents, which sum together with his certificate must be forwarded to the sovereign camp with his request written upon the back of the certificate, giving the name or names of such new beneficiary or beneficiaries and is as follows:

“And that, upon receipt thereof, the sovereign clerk should issue and return a new certificate, subject to the same conditions and rights as the one surrendered, which conditions should be a part of the new certificate, in which he must write the name or names of the new beneficiary or beneficiaries and record the change in the proper books of the sovereign camp; that, in the event of the beneficiary certificate being withheld from the member desiring to make the change, before such change shall be made, the member to furnish the sovereign clerk satisfactory proof, under oath, of the facts and circumstances of the withholding of such certificate from his possession, and waiving for himself, or beneficiary or beneficiaries, all rights thereunder, whereupon upon the payment of twenty-five cents, the sovereign clerk, if such proof shall be satisfactory to him, should issue to such member a new certificate in lieu of the old one, with the desired change of beneficiary; another section providing that a member could not hold more than one beneficiary certificate at the same time; another providing that no officer, employee or agent of the sovereign camp, or of any camp, had the power, right or authority to waive any condition upon which beneficiary certificates were issued, or to change, vary or waive the provisions of the constitutional laws, and that each and every beneficiary certificate is issued upon the conditions stated in and subject to the constitution and laws then in force or thereafter enacted; and another section providing that, after proof of death had been approved by the proper officer and the sovereign camp, a warrant should be

drawn for the amount named in the certificate, 'payable to the beneficiary or beneficiaries named therein, or their legal representatives.'"

There was evidence in the case to the effect that plaintiff and his wife had lived together happily; that he had always been a mild mannered man, kind and gentle, until after his first return from the hospital, when, according to plaintiff and her witnesses, he began to have hallucinations and was, for two or three days before being taken to the city hospital, delirious part of the time, believing that the physicians at his home were not treating him properly. In contradiction of this there was testimony from a number of witnesses that while he was sick and feeble in body, his mind was sound. This was practically all the evidence in the case.

At the conclusion of the trial, which was before the court as chancellor, and on the interpleas, the court entered up a finding and decree in favor of the St. Louis Union Trust Company, and adjudged the entire fund, which had been paid into court by the sovereign camp, to the St. Louis Union Trust Company as curator, the original defendant, sovereign camp, Woodmen of the World, having previously been discharged from the case on depositing the fund with the court. Within due time the plaintiff, Mrs. Walsh, filed her motion for a new trial which was overruled, exception saved and the case brought to this court.

REYNOLDS, P. J. (after stating the facts).—The conclusion of the learned trial judge on the issue of soundness of mind of Patrick Walsh being supported by ample testimony in the case will not be disturbed by us. He had the witnesses before him, heard them testify, was able to determine the weight to be given to their testimony, especially in case of conflict as there was here, and while we are not bound by his finding, that finding on the facts is always very persuasive and will

ordinarily be followed by us. The issue of soundness of mind, we, therefore, hold is concluded by the finding of the learned trial judge, it being supported by substantial evidence. As to the law of the case as applicable to the facts here, it is unnecessary for us to enter into an elaborate discussion of it. By the interpleader and issues framed, this case was converted into a suit in equity and is to be determined on the principles applied by courts of equity to cases of this character. One of the fundamental and time-honored doctrines of equity is that a court of equity will apply to the transactions its well-known maxim that equity looks to the intention of parties to contracts rather than to the form in which that contract is evidenced, and if the intention is clearly manifest or can be ascertained with reasonable certainty, a court of equity will carry it out, although the form of its expression may be defective, either in non-compliance with some specific rules or even conditions of the law itself. Applying that to the facts of the case at bar, we think that its determination rests on the principle announced in *National American Assn. v. Kirgin*, 28 Mo. App. 80, 1. c. 82; *Hofman v. Grand Lodge B. L. F.*, 73 Mo. App. 47, 1. c. 53; *St. Louis Police Relief Assn. v. Strode*, 103 Mo. App. 694, 77 S. W. 1091; *Grand Lodge A. O. U. W. v. O'Malley*, 114 Mo. App. 191, 1. c. 205, 89 S. W. 68; *St. Louis Police Relief Assn. v. Tierney*, 116 Mo. App. 447, 91 S. W. 968; and *Grand Lodge A. O. U. W. v. McFadden et al.*, 213 Mo. 269, 111 S. W. 1172, the latter being a decision by our Supreme Court on a certification to that court by this court of the case referred to above under the title of *Grand Lodge A. O. U. W. v. O'Malley*, and in which the decision of this court, said to be in conflict with one by the Kansas City Court of Appeals, was approved in an elaborate opinion by Judge WOODSON. Judge WOODSON, speaking for Division No. 1 of the Supreme Court, has so conclusively settled the law as applicable to the facts such as are presented in this case, and settled them against the contention of the

appellant here, that we do not think it necessary to go into any elaborate exposition of it. We hold that while the form in which the change of beneficiaries in the case at bar is not strictly in accordance with the rules of the order, it is substantially as required. All the objection the order made to it was to its form; so far as the order is concerned, it does not now stand on that, but declares its willingness to pay the fund to whomsoever the court shall find is entitled to it. But the failure of the order to insist on the form cannot and does not bind parties claiming under the rules of the order. They have a right to insist and claim as is here done that the change was not made as provided by those rules, which are a part of the contract. The intention of the member to make the change and the change he intended are very clearly set out. That death intervened before he could conform to the rules and express that intention formally should not and will not prevent a court of equity from enforcing that intent and making it effective, the member having done all that was within his power to carry out his intention. He did not have the certificate on which the form of change of beneficiary was printed; nor did the secretary of his camp have one. Whether the policy was withheld by his wife is not material. Walsh did not have it with him at the hospital. It was not in his possession. So he did all he could do under the circumstances.

The judgment of the circuit court is affirmed. All concur.



**BENJAMIN R. BREWER, Appellant, v. WADE  
CARY, Respondent. .**

**St. Louis Court of Appeals. Argued and Submitted April 4, 1910.  
Opinion Filed April 19, 1910.**

1. **GUARDIAN AND WARD: Removal of Guardian: Probate Courts: Exclusive Jurisdiction.** Under the provisions of sections 3480, 3481 and 3482, Revised Statutes 1899, and section 34, article 6 of the Constitution, the power of appointment and removal of guardians and curators of minors is vested solely in the probate court.
2. **JURISDICTION: Exclusive Jurisdiction: Courts.** Where the Constitution and statutes have by specific provisions conferred jurisdiction in particular matters on certain designated courts, thus clearly indicating that such jurisdiction is in those courts exclusively, it is not within the power of any other court, whether of law or equity, to assume such jurisdiction.
3. **EQUITY: Deals Only With Question Affecting Property.** Equity is concerned only with questions affecting property, and it exercises no jurisdiction of wrongs to the person or to political rights, or because the act complained of is merely criminal or illegal.
4. **GUARDIAN AND WARD: Powers of Guardian: Education and Religious Training of Ward.** The determination of matters of education of the ward, both secular and religious, is committed to the guardian, natural or appointed.
5. ———: ———: ———: **Statutes.** The state does interfere, however, by requiring, under section 3494, Revised Statutes 1899, that the guardian appointed by the probate court shall not be "a person of religious persuasion, different from that of the parent, or of the surviving parent of the minor, if another suitable person can be procured, unless the minor, being of proper age, should so choose," which amounts to a legislative declaration that the religious as well as the secular education of the minor is to be committed to the person who is appointed guardian.
6. **INFANTS: Habeas Corpus: Welfare of Child.** In a proceeding by habeas corpus for the custody of a child, the welfare of the child itself invariably determines the matter, and not the naked question of right of custody in either parent or in the appointed guardian.

7. ———: ———: ———: **Powers of Court: Removal of Guardian.** In cases arising under the Habeas Corpus Act, the court, having regard to the welfare of the child, will remit or commit its custody to one or the other of the parties before it in that proceeding, but it will not attempt to appoint or remove a guardian or curator, or a parent from the guardianship of the child, leaving that to the probate court; nor will it direct the guardian as to matters of teaching or training of the ward.
8. **GUARDIAN AND WARD: Unfitness of Guardian: Removal.** If the guardian, or even the parent, is an unfit person, the remedy provided by statute is to institute proceedings in the probate court for his removal.
9. ———: **Removal of Guardian: Directing Religious Training of Ward: Circuit Courts Have no Such Jurisdiction.** The circuit court on its equity side has no jurisdiction to remove a father as natural guardian because of a breach of an ante-nuptial contract providing that the offspring should be brought up in the Catholic Faith, nor to direct the father, as natural guardian, to bring up the offspring of said union in that faith, since the probate court has exclusive original jurisdiction in all matters relating to the appointment and removal of guardians of children.
10. **INFANTS: Suits by: Necessity of Appointing Next Friend: Parties.** Where an ante-nuptial contract provided that the father would bring up the children of the union in the Catholic Faith even if the wife should die, at the death of the wife, her father who was not appointed as a next friend under sections 550, 551, and 553, Revised Statutes 1899, had no standing to seek to compel performance of the contract in behalf of the infant children of the union, who were under fourteen years of age, since the statutes provide the only way in which an infant can sue.
11. **HUSBAND AND WIFE: Ante-nuptial Contract for Religious Training of Children: Not Property Right.** Under an ante-nuptial contract providing that the wife would have the right to bring up the offspring in the Catholic Faith, the right of the wife is not a property right that would pass to and be enforceable by her personal representative at her death.
12. **PARTIES: Capacity to Sue: Properly Raised by Demurrer: Pleading.** The objections that a plaintiff, suing as next friend of infants, was not appointed by the court as provided by statute is not waived by not making a special appearance, where the petition was demurred to on that ground.
13. **HUSBAND AND WIFE: Ante-nuptial Contract for Religious Training of Children: Not Property Right: Specific Performance.** An ante-nuptial contract, providing that the children

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should be brought up in the Catholic Faith, even if the wife should die, cannot, after her death, be specifically enforced, since no property rights are involved.

14. ———: ———: **Public Policy: Specific Performance.** An antenuptial contract, providing that the offspring should be brought up in the Catholic Faith, even if the wife should die, is not, after her death, an enforceable contract against the husband, since public policy forbids the permanent transfer of the natural rights of a parent.
15. ———: ———: **Moral Duty: Specific Performance.** An antenuptial contract, providing that the offspring should be brought up in the Catholic Faith, even if the wife should die, cannot be specifically enforced, since only a moral duty is involved, which is not a ground of equitable jurisdiction.
16. ———: ———: **Welfare of Child: Specific Performance.** An antenuptial contract, providing the offspring should be brought up in the Catholic Faith, even if the wife should die, is not enforceable in equity on the ground that the court would look to the welfare of the child, since that would result in determining between religions, which the court will not do.

Appeal from St. Louis City Circuit Court.—*Hon. Matt. G. Reynolds*, Judge.

**AFFIRMED.**

*Benjamin R. Brewer, Gardner & Morgan* for appellant; *John L. Carlew, J. F. Conran* and *James M. Dohan* of counsel.

(1) The foundation of a republic is the virtue of its citizens. *Marshall v. Railroad*, 16 How. 314; *Trist L. C.*, 214, *Hughes' Datum Posts*, p. 102; *Oakley v. Davies*, 58 Tex. 141; cases stated in *Newcomb*. (2) National morality depends upon religion. *Washington's Farewell Address*; *State v. Williams*, 26 *Howell's State Trials* 654; *Church v. United States*, 143 U. S. 457, and numerous cases cited; *State v. Ambs*, 20 Mo. 214; *St. Joseph v. Elliott*, 47 Mo. App. 422. (3) Marriage is the highest consideration known to the law either to raise a use, found a contract, gift or grant. *Norwack v. Beyer*, 133 Mo. 24; *Coke on Littleton*, 96; *Johnston*

v. Dillon, 1 Bay 232; 4 Kent's Com. 465; 1 Bishop Mar. Wom., sec. 27775; Ford v. Stewart, 15 Rev. 499; Greene v. Cramer, 2 Con. & Law 60; Fraser v. Thompson, 1 Giff. 62; Holder v. Dickson, Freeman, 96; Smith, Hof. 216a; Waters v. Howard, 8 Gil. 262; Barron de Biel, 12 Ch. & Fin. 45, 78, 79; Nowack v. Berger, 133 Mo. 39; 29 Cyc., p. 1592, 20 Am. Dec. 324; State v. Broton, 15 Am. L. Rep. (N. S.) 359; Lamar v. Harrisll, 117 Ga. 993; Miller v. Miller, 123 La. 165; State v. Barnett, 45 N. H. 15; Fitzgerald v. Fitzgerald, 24 Hun 370; Clark v. Boyer, 32 Ohio St. 299. (4) That the filing of this proceeding to effect the personal rights of the infants is a proper subject of chancery jurisdiction. 22 Cyc., p. 520; Cole v. Gorley, 79 N. Y. 527, 9 Hun 493; Isaacs v. Boyd, 5 Port. (Ala.) 388. (5) The exigencies of each case as to the bringing of the suit rests upon its own facts, and a court of chancery will make such order regarding the same as it deems proper. 1 Beach on Modern Equity, p. 55; 22 Cyc., p. 640; In re Mitchell R. M. Corlett 489; In re Browns, 117 Ill. App. 332; Colter v. Cypert, 78 Ark. 193; Reeves Dom. Rel. 315; Rhodes v. Rhodes, 43 Ill. 339; Loyd v. Mallone, 23 Ill. 43.

*Wilfley, McIntyre & Nardin* for respondent.

(1) Over that part of the petition asking for the appointment of a guardian the court had no jurisdiction. Sec. 3480, R. S. 1899. (2) Plaintiff, not having been appointed next friend by any order of court, had no standing in court and no right to bring suit for minor children. Secs. 550, 551, 552, 553, R. S. 1899. (3) Courts of equity will not enforce agreements or take cognizance of rights unless some property right is involved. They do not undertake to enforce mere moral or religious obligations. Bispham's Principles of Equity (8 Ed.), p. 58, and cases cited. (4) An agreement or promise of a father in regard to the religious training or education of his children will not be enforced against him in the courts. Agar-Ellis v. Las-

celles, 10, Chanc. Div. 49, Law Rep. 1878, 1879, 42 Victoria; Andrews v. Salt, Law Rep. 8, Chancery 626; In the matter of Laura Doyle, 16 Mo. App. 159; In the matter of Bernice Scarritt, 76 Mo. App. 567; Weir v. Marley, 99 Mo. 484.

**STATEMENT.**—The plaintiff in this case has brought this as a suit in equity, praying the circuit court, in which court it was instituted, “to make its order of record” requiring and directing the defendant to permit an infant some three months old to be baptized under the forms of the Roman Catholic Church and to allow an older child, between three and four years of age, to go to that church and to attend services thereat and to be instructed in the faith of its mother, to the end that the defendant be compelled to keep and perform an agreement, entered into between defendant and his former wife at the time of contracting the marriage between them. The agreement as set out in the petition is as follows:

“I, the undersigned, Wade Cary, not a member of the Roman Catholic Church, wishing to contract marriage with Miss Gertrude A. Brewer, a member of the Roman Catholic Church, propose to do so with the understanding that the marriage bond thus contracted is indissoluble except by death; and I promise that she shall be permitted the free exercise of religion according to the Roman Catholic Faith, and that all children of either sex, born of this marriage, shall be baptized and educated in the Faith and according to the teaching of the Roman Catholic Church, even if she should happen to be taken away by death.”

It is averred in the petition that this agreement was voluntarily entered into by defendant, and was made in accordance with and pursuant to the laws of the Roman Catholic Church and was signed and executed by the defendant, “with full knowledge that the marriage could not take place without that. The agree-

ment was taken and accepted by the parties named therein at the time, and by the minister of the church, who thereupon performed the marriage rite."

It is further set out in the petition, that the plaintiff brings this suit in behalf of the infant children who were born of the marriage between the parties to the aforesaid agreement, "as in the capacity of next friend, for them, because they are helpless to sue for themselves and suffer great wrongs at the hands of their guardian, the defendant herein, and they are now without redress or relief; that said defendant being the natural guardian of said children, it has become necessary that your petitioner bring this action, on their behalf, moved by motives of bounden duty, and affection, arising out of the relation by blood that petitioner sustains to said children, for whose sole benefit he brings this action, and prays the court, in the exercise of its just powers, to permit him to prosecute this suit, for the reason stated and hereafter to be stated; as well also, for the reason that petitioner was godfather to one of the children, . . . at the time it received the sacrament of baptism, which was also by the consent, and at the request of the defendant, and according to the rites of the Catholic Church, and because, by virtue of the rules and usages of the church, it is now obligatory upon petitioner, as such godfather, so acting as aforesaid, at the instance and request of defendant, to see that the child receives religious instruction in the faith of the Catholic Church, and to use all reasonable and lawful means to that end; for these reasons, and the desire to make secure, as far as he can, the welfare of the children, now, and in the future, it has become, as aforesaid, the duty of this petitioner to institute this action, in order that the defendant shall be required and caused to keep and perform his agreement hereinafter set forth."

He further states that he is the grandfather of the children, who are children of his deceased daughter, who was the wife of the defendant; that their mother died

June 23, 1908, in the faith of the Roman Catholic Church, and left the two children born of the marriage aforesaid with the defendant, and that both of them are now living and under the control of the defendant in the city of St. Louis. It is then averred in the petition, "that the defendant is guilty of unlawful oppression of the children, in his capacity over them, and his treatment of the children violates the agreement hereinafter set forth."

The petitioner further avers that he appeals to the court in its capacity as a court of equity and of conscience, "in behalf, and in furtherance of the children's just rights, which are of the highest importance to them, in human affairs; and in order, to keep them from sin, evil and harm, and to prevent the evil, that may hereafter come upon them, and be suffered in the future by them, by reason of the failure of the defendant to keep and fulfill his obligation, under the terms of said agreement."

The petition contains the further averment that the defendant, for the consideration of entering into the bond of marriage aforesaid, "is now thereby estopped and cannot rightfully exercise the privilege of preventing, at his will, as he is now doing, said children from having the benefits which that agreement was intended to secure to them; that it is a grave wrong, legally and morally, for him to do so, and is great injustice to the children, and is a fraud upon their most sacred rights to deprive them of the benefits of that agreement, which inures to them; that their injury is irreparable; that they are without remedy, save by a court of equity; that defendant without any hardship, or difficulty, or expense to him, could and can now, fulfill said agreement." The agreement is then set out as before noted.

It is further set out that by the laws of this State, minor children of the tender age of these children shall not be committed to the guardianship of a person of religious persuasion different from that of their parents

and that inasmuch as the mother of the children was of the Roman Catholic Church and is now dead and that the defendant is not of that faith, he never having been baptized, that the children ought not to be subjected to his guardianship while he disregards that agreement in so far as their religious training is concerned, and that by reason of the agreement the defendant divested himself of the privilege he now claims and is now shorn of the personal privilege of a surviving parent that he would have had in the absence of the terms and the considerations of the agreement. It is charged that the defendant has wilfully refused and now still refuses and threatens and intends hereafter to refuse to permit the younger child to be baptized and also refused and intends and threatens to refuse to permit the other one to be taught in the faith aforesaid. The plaintiff prays that the older child "be considered a ward of this court;" that she is a Catholic, is entitled to have and enjoy its religious rights and privileges as a Catholic child, and that the defendant restrains her and will not allow her the constitutional and lawful right of that faith and persists in a course of conduct calculated to deprive her and in fact does deprive her of the lawful and constitutional rights that belong to her, and the right to have a guardian of the faith of her deceased mother to which she is entitled; that defendant keeps her from church and from all her relatives who are of that faith and that his conduct is injurious and demoralizing to her and violates her rights under the law of the land; "that his willful disregard and violation of the antenuptial agreement, and his acts and doings, aforesaid, is a species of fraud and falsehood repugnant to the law and against the sound principles of morality." It is further stated that the younger child is of sufficient age and for several months has been old enough to receive baptism in accordance with the agreement, and that the older one is now of sufficient age and capable of being taught in the faith referred to; that the defendant has



remarried and his wife, the stepmother of these children, is not of the faith of their mother, and, finally, it is averred that the children are in great danger of being deprived of their inherent rights aforesaid unless by the intervention of the court, the course and conduct of the defendant toward the children be checked "to prevent their loss and their ruin." It is averred that the defendant's disregard and repudiation of the solemn obligation aforesaid, "is a wrong, grave, palpable and deliberate, and is without justification or excuse." The prayer for relief is as before stated.

A demurrer was filed to this petition in which three grounds were stated: First, that the court has no jurisdiction; second, that the plaintiff has no legal capacity to sue; and third, that the petition does not state facts sufficient to constitute a cause of action. This was sustained. Plaintiff declining to plead further, judgment went for the defendant from which plaintiff has duly perfected an appeal to this court.

REYNOLDS, P. J. (after stating the facts).—At the threshold of the case we are confronted with the propositions that the circuit court has no jurisdiction over the appointment of a guardian of children, and that the plaintiff, not having been appointed next friend by any order of court, had no standing in court and no right to bring suit for the minor children.

First. If this is to be considered a case for the removal of the defendant as surviving parent and natural guardian of the children, the case cannot stand, for we have a statute that must govern. Our statute, sections 3480, 3481 and 3482, Revised Statutes 1899, provides for the appointment and removal of guardians. Section 3480 provides that if a minor have no parent living, or the parents be adjudged incompetent or unfit for the duties of guardianship, the probate court, or judge or clerk thereof in vacation, subject to the confirmation or

rejection of the court of the county of the minor's domicile, shall appoint guardians to such minors under the age of fourteen years and admit those above that age to choose guardians for themselves, subject to the approval of the court at its next term thereafter, and it is further provided by that section, that any question as to the "unfitness or incompetency of parents, after ten days' notice to the parents, shall be decided in the probate court by the judge thereof, or by a jury, if one be demanded." Section 3481 provides that the probate court and judges thereof may appoint guardians and curators of minors who are deaf and dumb, and who are over the age of fourteen years, and that the probate court may appoint a guardian or curator of the person or estate of any minor whose father may be imprisoned in the penitentiary of this State, the appointment only to last while the father is in prison and shall not deprive the mother of her rights to the custody of her children. Section 3482 provides that the lawful parent of any minor, not having been adjudged unfit for the duties of the guardianship of such minor, may, when the other lawful parent is dead, "and only in such case, by will, appoint a guardian of the person of such minor."

Section 3494 provides: "A minor shall not be permitted to the guardianship of a person of religious persuasion different from that of the parents, or of the surviving parent of the minor, if another suitable person can be procured, unless the minor, being of proper age, should so choose."

These are all the provisions of our statute material to be considered relative to the appointment and removal of guardians and curators of minors and it is to be observed that the power for appointment and removal is vested solely in the probate court. Moreover, section 34, article VI, of our Constitution, providing for the establishment of probate courts, ordains that those courts shall have jurisdiction over all matters pertaining to the appointment of guardians and curators of minors.

Construing this provision, our Supreme Court, in *Hoffman v. Hoffman's Executor*, 126 Mo. 486, l. c. 493, 29 S. W. 603, held that in matters within their constitutional jurisdiction the probate courts have exclusive original jurisdiction to the exclusion even of courts of equity. See also *Titterington, Admr., v. Hooker et al.*, 58 Mo. 593; *Pearce v. Calhoun*, 59 Mo. 271, and *Redmond v. Quincy, O. & K. C. R. Co.*, 225 Mo. 721, 126 S. W. 159.

It is distinctly announced in the case of *DeJarnett v. Harper*, 45 Mo. App. 415, at page 421, that "the incompetency or unfitness of the mother for the duties of the guardianship can only be tried and determined by the probate court of the county where such mother is domiciled, and this, too, after ten days' notice to such mother. The statute has provided in specific terms how and by whom this question of unfitness shall be tried and adjudged, and no other court or tribunal can assume to act in the premises." Section 5281, Revised Statutes 1889, now section 3480, Revised Statutes 1899, is cited in support of this. The authority of this case of *DeJarnett v. Harper* has never, so far as we are aware, been questioned. It is true that the point in decision was as to which of two probate courts—considered as between them—was entitled to make the appointment. But it is controlling by way of argument, on the proposition that jurisdiction is lodged in the probate courts alone. Original jurisdiction to appoint or remove a guardian of the person or curator of the estate being lodged in the probate courts alone, no original power to do either is lodged in the circuit courts. Broad and extensive as are the powers of a court of equity, when our Constitution and statute have by specific provisions conferred jurisdiction in particular matters on certain designated courts, thus clearly indicating that such jurisdiction is exclusively in those courts, it is beyond the power of any other court, whether of law or equity, to assume a jurisdiction expressly conferred by statute

upon other tribunals. In this matter of jurisdiction our system is radically different from that of Great Britain.

Referring to Pomeroy on Equity Jurisprudence, probably the most voluminous and exhaustive work on that subject, it is said at section 78, vol. 1 (3 Ed.), that whenever an infant succeeds to property the English chancery takes the management of his person and his estate and a proper suit having been commenced the court appoints a guardian in the absence of a testamentary appointment, and the infant is thereafter a "ward of the court," under its actual paternal care; that in some of the states the courts possessing full equitable jurisdiction have theoretically the power to appoint a guardian but that even if this power is exercised the court does not make the infant its ward and extend a personal oversight over him but that in this matter, where the Legislature has intervened and the jurisdiction is vested in the probate courts, these probate courts "practically appoint all guardians, and control their official actions. Under their general power in cases of trust and of accounting, the American courts of equity may give all proper relief to wards against their guardians; but the peculiar jurisdiction over the persons and estates of infants possessed by the English chancery does not, to any extent, exist in the American equity jurisprudence." This latter declaration, that the jurisdiction over the persons and estates of infants possessed by the English chancery does not, to any extent, exist in American equity jurisprudence, is in line with the rule of equity universally recognized in this country that "equity is concerned only with questions which affect property, and it exercises no jurisdiction in matters of wrongs to the person or to political rights, or because the act complained of is merely criminal or illegal." [Bispham's Equity (6 Ed.), p. 57.] Mr. Pomeroy further treating of the control of courts of equity over infants, says (vol. 3, secs. 1303 and following), that while in England this particular jurisdiction is one of the most

important branches of equity jurisprudence, in this country, by reason of statutory legislation, it is relatively of much less importance; that in England, in order that the jurisdiction may be acquired in any particular case, the infant must be made a "ward of the court," and that when the court appoints a guardian, which is ordinarily the first step taken, the future control of the infant's person and property is usually exercised upon and through this guardian, and that in addition to the power to appoint guardians, a court of equity will also exercise its jurisdiction in a proper case, and to permit the highest welfare of the infant; where there is already a guardian, natural or legal, it will do so by controlling the person of the infant and by removing the infant from its natural or legal guardian, even from the custody of its own parents. It may do that only in case the habits, practices, instruction or example of the parents exerting a personal influence on the infants, tend to corrupt their morals and undermine their principles, or when the parent is neglecting their education suitable to their condition in life, or is endangering their property or is guilty of cruelty toward them. Under like circumstances it will remove infants from the custody of a legally appointed guardian. Having appointed a guardian for a "ward of the court," the supervision and control is ordinarily exercised by supervising, directing and controlling the acts of the guardian, and that guardian may be supervised and directed in the conduct; First, of the intellectual, moral and religious training of the ward; second, the protection and management of his property, including his maintenance, and third, his marriage, and that while the education of the ward will be directed by the court to be that suitable to his prospects and condition in life, "the manner and course of the education and of its details are left to the judgment and discretion of the guardian, and the ward will be compelled to comply with his guardian's decision. The English courts exercise some supervision over

the religious training of the ward, acting upon the general rule that the ward should be brought up in the religious beliefs, opinions and practices of his father. This general rule is subject to modification, however, under the particular circumstances of individual cases."

It will be seen from this that even under the English rule, the appointment of a guardian, or leaving the infant in the care of its parent, commits to the natural or appointed guardian the determination of matters of education, both secular and religious, as well as the proper maintenance of the ward. In most of our American states and certainly in this State, these matters are all committed to the guardian, natural or appointed, and are under control of the probate courts. The state does interfere, however, by the requirement that the guardian appointed by the probate court (section 3494) shall not be "a person of religious persuasion different from that of the parents, *or of the surviving parent of the minor*, if another suitable person can be procured, unless the minor, being of proper age, should so choose. This amounts to a legislative declaration that the religious, as well as the secular, education of the minor is to be committed to the person who is appointed guardian. The only way, therefore, under our law, to remove a person so appointed guardian or to take the care of the child from the surviving parent, in case that parent or the parents are adjudged incompetent or unfit for the duties of guardianship, or the guardian is not of the religion of the surviving parent, is by proper proceeding in the probate court. The fact of disqualification being found, the probate court has power to appoint a suitable guardian. That guardian must be of the faith of the *surviving parent*. We are not here referring to cases which have arisen in our courts and in other jurisdictions, where, under the writ of habeas corpus, and in a conflict over the right of control of the minor, our courts, not as courts of equity, but as common law courts, and proceeding under the power of such courts lodged in

them to issue, hear and determine writs of habeas corpus, determined the question of custody. That, in such cases, is determined, not on the naked question of right of custody in either parent, or of the appointed guardian, but invariably on the determination of the question which our courts hold to be paramount to all others, namely, the welfare of the child itself. Such are the Doyle Case, 16 Mo. App. 159; *In re Scarritt*, 76 Mo. 565, and *Weir v. Marley*, 99 Mo. 484; 12 S. W. 798. These are leading cases on this question in our jurisdiction. *United States v. Green*, 3 Mason 482; *People v. Mercen*, 3 Hill (N. Y.) 399; *In re Waldron*, 13 Johnson 417; *Ex parte Schumpert*, 6 Rich. (S. C.) 344; *Gishwiler v. Dodez*, 4 Ohio St. 615 are leading cases in other American courts. In the English courts the case of *In re Scanlan*, L. R. 40, Ch. D. 200 (1889); *Andrews v. Salt*, 8 Ch. App. 622 (1873), s. c. L. R. 10 Ch. Div. 49; and *In re Nevin*, 2 Ch. L. R. (1891) 299 are well known and often cited with approval by our own courts. While the older English cases inflexibly carried out the wishes of the father, recognizing his authority as supreme, even to the extreme of taking the infant from the virtuous mother and committing it to the care and custody of a dissolute father living in adultery, the English conscience, shocked at the hardship of such a rule, found voice in an act of Parliament, in what is called "Justice Talfourd's Act" (2 and 3 Vict., chap. 54), which practically overturned the rule. "This act proceeds upon three grounds," says Schouler on Domestic Relations (5 Ed.), sec. 247, "First, it assumes and proceeds upon the existence of the paternal right. Secondly, it connects the paternal right with the marital duty and imposes the marital duty as the condition of recognizing the paternal right. Thirdly, the act regards the interest of the child." Under a later act (36 and 37 Vict., chap. 12), it is provided that the surrounding circumstances of a case will be more sedulously regarded, even against a father's own application for custody; paternal

right, the marital duty, and the interest of the child being all considered.

Primarily, however, by our own law as above quoted, and in cases involving the education, secular and religious, of the child, the control and direction is with the surviving parent, if one of them be dead, or in the guardian appointed by the court, it being assumed, and our law proceeding upon the assumption, that he to whom is committed the custody of the infant is the one to direct its training and education, and that if it is shown that he is not the proper party to be charged with this trust, he is to be removed from the trust. That action, however, originally and exclusively, is in the probate court and not in the circuit court. Even in the probate court the qualification is that the selected guardian is of the faith of the surviving parent, it being assumed that the person so selected will train up the child in that faith. Even in cases arising under habeas corpus proceedings, the court having regard to the welfare of the child will remit or commit its custody to one or the other of the parties before it in that proceeding, having regard to the welfare of the child, but it will not attempt in that proceeding, to appoint or remove a guardian or curator, or a parent, from the guardianship of the child, leaving that to the probate court. Nor will it direct the guardian as to any matters of teaching or training. In no case to which we have been referred by counsel, nor which our own research has disclosed, have we found any instance in this State, in which our circuit courts, acting as courts of equity, or as law courts proceeding under the writ of habeas corpus, have undertaken to exercise any such powers as here invoked. In no case have any of our courts directed a guardian remaining in control and custody of the ward, whether that guardian is the father, mother or one appointed by the court, as to what particular course of education or training, secular or religious, is to be pursued. The remedy by statute is, if the party acting as guardian or in the



place of the parent, or even the parent, is an unfit person, by proceeding instituted in the probate court. This goes to the very root of plaintiff's claim, even admitting that he has capacity to sue, if it be held that his present action seeks the removal of the defendant as guardian, or if he is attempting, as the prayer of his bill seems, to have the circuit court direct the father, as natural guardian and sole surviving parent to pursue a certain line of conduct toward the religious training of his children.

Second. The plaintiff in this case, as grandfather of both children and as godfather of one of them, has not, as such, under the law, a standing in court to maintain this suit. Our statute has made specific provisions for suits by and against infants. Sections 550 to 553, Revised Statutes 1899, cover this matter. Section 550 provides that suits by infants may be commenced and prosecuted either, first, by the guardian or curator of such infant, or, second, by next friend, appointed for him in such suit. Section 551 provides that the appointment of a next friend for an infant shall be made by the court in which the suit is intended to be brought or by a judge or clerk thereof. Section 552 provides that the appointment shall be made on petition in writing of the infant, if of the age of 14 years, and the written consent of the person proposed to be next friend to such infant, acknowledged before and approved by the court or officer making the appointment. Section 553 provides that if the infant be under the age of fourteen years, the appointment of a next friend may be made upon a like petition of a relative or friend of the infant, in which case, a notice thereof must first be given to the person with whom such infant resides. If this contract is enforceable, it is clear that this plaintiff has no right under our law to enforce it. It is also clear that the right assumed to be conferred on the wife by the contract, to have the children brought up under and in accordance with the tenets of a particular religion, is not a prop-

erty right which would pass to and be enforceable by the executor or administrator of the deceased wife. If the contract was one which the courts would specifically enforce, it may be that the law would regard it as entered into by one person, in this case the mother, for the benefit of third parties, the children, and in such case enforceable at the suit of the children in affirmance of their right in accordance with the forms provided by the statute, *supra*, authorizing suits by infants through a next friend, duly appointed by the court. [Cress v. Blodgett, 64 Mo. 449.] Plaintiff has no such appointment.

It is said by the learned counsel for the appellant that by not making a special appearance, the defendant waived the objection that plaintiff had not been properly appointed as next friend. The only authority cited in support of this contention of waiver is that of Blair v. Henderson, 49 W. Va. 282. That decision was under a code different from ours. The point here made is founded on a misapprehension of our law. The petition was specifically demurred to on the ground that the plaintiff had no legal capacity to bring this suit. Our statute and decisions not only authorize but require this question of capacity to sue to be raised by demurrer, when the defect appears on the face of the petition, it being said in Jones v. Steele, 36 Mo. 324, and Rogers v. Marsh, 73 Mo. 64, that the waiver occurs only when there is a failure to demur. The second ground of demurrer in this case is distinctly based upon this defect of capacity or authority in plaintiff to sue. There are no averments in the petition, no allegations in it, that warrant us to depart from these requirements of the provisions of the statute before referred to and allow this plaintiff to maintain this suit.

Third. We might rest our decision on the above propositions, but for the fact that counsel have made a very strong appeal and able argument in support of the merits of the case, resting their contention of the en-

forceability of the ante-nuptial agreement between the defendant and his deceased wife. We will therefore briefly notice that contention.

It is hardly necessary to observe that courts of equity have power to decree specific performance of contracts. That, however, as already noted, is a jurisdiction to be exercised in matters affecting property, and property rights. Even in the English chancery courts, when they assume jurisdiction of an infant and make the infant a ward in chancery, it is always on the assumption, sometimes a mere fiction, that the infant ward has property interests, the protection or enforcement of which requires the intervention of the chancellor. [Pomeroi, *supra*.] Here there is no pretense of any property right being involved and we might dispose of the case on that ground. But passing that, it surely cannot be pretended that equity can deal with any but enforceable contracts. We are therefore, in order to give plaintiff any standing whatever in a court of equity, to determine whether the contract he seeks to have the court compel defendant to observe—which he seeks to have specifically enforced—is an enforceable contract. Schouler, in his work on Domestic Relations (5 Ed.), an accepted authority frequently recognized by our courts, treating of such agreements, says (sec. 251): “The general doctrine appears to us, on the whole, to be this: That public policy is against the permanent transfer of the natural rights of a parent; and that such contracts are not to be specifically enforced, unless in the admitted exception of master and apprentice, to constitute which relation requires, both in England and America, certain formalities; and excepting, too, in parts of the United States where the principles of legal adoption are part of the public policy.”

At common law the father cannot divest himself, even by contract with the mother, whether made before or after marriage, of the custody of his children. [Schouler, Domestic Relations (5 Ed.), p. 396, sec. 253.]

In *Andrews v. Salt*, *supra*, where there was an ante-nuptial agreement between the parties about to marry, that boys born of the marriage should be educated and brought up in the religion of the father, who was a Roman Catholic, and that the girls should be brought up in the religion of the mother, who was a member of the Church of England, Lord Justice MELLISH, who delivered the judgment of the Court of Appeals in Chancery, said (l. c. 636): "The first question we shall consider is, what is the legal effect of an agreement made before marriage between a husband and wife of different religious persuasions that boys should be educated in the religion of the father, and girls in the religion of the mother? We are of opinion that such an agreement is not binding as a legal contract. No damages can be recovered for a breach of it in a court of law, and it cannot be enforced by a suit for specific performance in equity. We think that a father cannot bind himself conclusively by contract to exercise, in all events, in a particular way, rights which the law gives him for the benefit of his children, and not for his own."

So in *Agar-Ellis v. Lascelles*, 27 W. R. 117 (1878), Lord JAMES delivering the judgment of the court, held (l. c. 119) that on principle and authority, it is settled "so as to be beyond question or argument, that the ante-nuptial promise is in point of law absolutely void." That promise was set out in a "treaty for marriage" afterwards consummated, by which the man gave the woman and her friends an unconditional promise that the children born of the marriage should be brought up in the religious faith of the woman. The husband retracted the promise after marriage. The court held he could not be compelled to observe it.

In the case of *In re Nevin*, *supra*, a case determined in the Chancery Division of the Supreme Court of Judicature, Sir Nathan LINDLEY, one of the Lords Justices of the Court of Appeal, following the decision by Mr. Justice CHITTY, one of the Justices of the High Court

attached to the Chancery Division, concurred in by BOWEN and KAY, JJ., held that an ante-nuptial contract that the children of the marriage should be brought up in a particular religious faith, has been decided over and over again not to be in any legal sense a binding contract. The opinions of the several justices in this case contain very full citation of authority on this proposition, among other cases cited being that of *Andrews v. Salt*, *supra*.

In our own State a phase of this same doctrine has been distinctly announced in at least three cases. The first, *In re Doyle*, *supra*, where Judge BAKEWELL, speaking for the court (l. c. 170) says, that the father had not by the agreement there referred to wholly parted with his rights as a father and that in the opinion of the court he could not by any such agreement wholly part with those rights.

In the case *In re Scarritt*, *supra*, our Supreme Court, after quoting approvingly from Schouler on Domestic Relations as hereinbefore quoted by us, at page 584, says: "As to any mere article of property, either personal or real, the law permits a man to dispose of it, by gift or contract, as he chooses. Not so of his children. The father owes a duty to nurture, support, educate and protect his child, and the child has the right to call on him for the discharge of this duty. These obligations and rights are imposed and conferred by the laws of nature; and public policy, for the good of society, will not permit or allow the father to irrevocably divest himself of or to abandon them at his mere will or pleasure. Such, generally, is the admitted law of the case."

In *Weir v. Marley*, *supra*, at page 494, treating of the right of a father to contract away the care and education of his child, it is said that, "He cannot deprive himself of this right of custody, which is the concomitant of a personal trust imposed upon him by the law of nature, as well as by positive law, and essential to the discharge of the duties of that trust, by contract *per se*,

otherwise he might deprive his child and society of the benefits which the law contemplates will inure to each by the personal discharge of his parental duties." Referring to the Scarritt case, *supra*, the court says, at page 495, "That a father cannot by contract, other than such as are provided for by statute, confer upon another irrevocably and absolutely as against himself a right to the custody of his minor child."

Referring to that feature of the case which is so earnestly pressed upon us by plaintiff and his counsel, namely that we are to and can consider the welfare of these children when closely connected with that is their religious training, we cannot do better than quote Judge BAKEWELL in the Doyle case, *supra*, in which case that learned judge has said: "A great deal has been said in the argument as to the religious question. In determining what will be best for the child, we cannot, under the system of law which we are appointed to administer, look at that. The state of which we are citizens and officers, does not regard herself as having any competency in spiritual matters. She looks with equal eye upon all forms of a so-called Christianity, and subjects no one to any disability for rejecting Christianity in any form, nor for rejecting the generally accepted doctrines of natural religion. A father in Missouri forfeits no rights to the custody and control of his child by being, or becoming, an atheist, nor are his rights in this respect increased before the law by his believing rightly. The law does not profess to know what is a right belief." After referring to the section of the law forbidding the appointment as guardian of one of a different faith from that of the surviving parent, Judge BAKEWELL says (l. c. 167): "We consider that the state has thus a declared policy, which we ought to respect in a kindred case."

These observations were made in a proceeding under the Habeas Corpus Act. In a proceeding in equity, as this case at bar is, a court of equity cannot decree

specific performance of a moral duty, cannot enforce a duty that is one of conscience. Nor can we, in determining what is for the welfare of the infant, determine that on considerations of religion. That would involve our determination between religions—and that we are not permitted to do.

In the light of the adjudged cases, and bound as we are to follow them, we hold, first, that original jurisdiction for the appointment and removal of a guardian, or for removal of a guardian appointed by law, or of a testamentary guardian, or for the removal of a surviving parent from the guardianship and control of an infant child, vests solely in the probate courts of the state; that the circuit courts, as courts of equity, have no original jurisdiction in such matters; that the right of custody as guardian, whether natural or by appointment of law, carries with it, as one of the incidents involved, the right as well as the duty to direct its training, its education, religious and secular, its conduct—in fact confers the right of a parent with all its incidents; that these are of the very essence of the appointment of guardians, and lie at the foundation of the right of custody itself, and that no court will interfere directly in directing such matters, save when convinced that the welfare of the child demands it. That when the question of its welfare turns on the direction of its training and upbringing in one belief or another, our courts, save as controlled by statute, have no power; that to do so would be a determination by the courts as to differences in religious belief, which is incompatible with religious freedom. On habeas corpus the circuit court, or court having jurisdiction over such proceedings, will determine when called upon to decide between different parties claiming the custody of the child, where the custody or the liberty of the child is involved, which custody will best advance and secure the welfare of the child, but will not undertake to appoint or remove a guardian. Nor can any court, as a court of equity, do so. Secondly, we

hold that this plaintiff has no standing in this court for lack of appointment under the statute as next friend of these infants. Thirdly, that the contract between the defendant and his former wife, now dead, is a contract which for the reasons hereinbefore stated is not enforceable at law or in equity. So holding, we conclude that the judgment of the circuit court in sustaining the demurrer and rendering judgment for the defendant in the case at bar, was correct. It is affirmed. *Nortoni, J.*, concurs; *Goode, J.*, not sitting.

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UNION LOAN, STORAGE & MERCANTILE COMPANY, Respondent, v. SAM FARBSTEIN, Appellant.

St. Louis Court of Appeals. Submitted on Briefs, April 6, 1910.  
Opinion Filed April 19, 1910.

1. **TRIAL PRACTICE: Pleading: Plea in Abatement: Separate Trial of.** In an action on an account stated and also for the price of goods sold and delivered, where all matters alleged in a so-called "plea in abatement" were properly set up in the answer and amounted to nothing more than a denial of indebtedness to plaintiff, and the issue tendered by such plea, contained in the answer, was nothing more than could have been given in evidence under the general denial, a trial on such plea separate from the trial of the merits was not necessary.
2. **JUSTICES' COURTS: Pleading: Account Stated.** The rule requiring an allegation of defendant's promise to pay the balance found due, in an action on an account stated, does not apply in actions before a justice of the peace, where formal pleadings are not required.
3. **ACTION: Splitting Causes of Action.** Where transactions between parties are entirely separate and distinct, each is subject to a separate action.
4. **TRIAL PRACTICE: Bill of Exceptions: Allowing Exceptions: Custom of Court.** The rule that exceptions must always be saved at the time the error complained of is committed is more



immediately for the protection of the trial court, hence the action of the trial judge, pursuant to a well-understood rule that counsel were assumed to have excepted to the giving and refusing of instructions, in allowing exceptions to instructions and embodying them in the bill, which he signed, although the official stenographer's notes did not show such exceptions, will not be interfered with by the appellate court, as the signing of a bill of exceptions by the trial judge is tantamount to a finding by him that he allowed the exceptions therein contained and that they had been duly preserved.

5. **APPELLATE PRACTICE: Vexatious Appeal.** Where an appeal is taken in absolute good faith, and the points made are well argued, the statutory penalty for a vexatious appeal will not be imposed.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. O. Hitchcock*, Judge.

**AFFIRMED.**

*S. P. Bond, Jesse A. Wolfert and Keith Ryan* for appellant.

(1) The merits of the plaintiff's case are not proper subjects of inquiry on a plea in abatement, and the plea in abatement must be determined before the other issues are tried. *Jordan v. Railroad*, 105 Mo. App. 446; *Commission Co. v. Block*, 130 Mo. 668; *Chouteau v. Broughton*, 100 Mo. 406; *Sauerwein v. Champagne Co.*, 68 Mo. App. 29; *Byler v. Jones*, 79 Mo. 261. (2) The court erred in admitting any evidence under the first count of respondent's petition over the objection and exception of the appellant, because the first count of respondent's petition does not state a cause of action, in that, the petition does not state that appellant promised to pay, and such allegation was necessary to constitute good pleading. *R. S. 1899, sec. 592*; *Railroad v. Kimmel*, 58 Mo. 83; *Overton v. Overton*, 131 Mo. 559; *Rush v. Brown*, 101 Mo. 586; *Pier v. Heinrichoffen*, 52 Mo. 333. (3) The court erred in not sustaining appellant's demurrer to respondent's case at the close of re-

spondent's case in chief as the evidence shows that respondent had split his account against appellant, which account amounted to more than \$500, and respondent brought two cases before different justices of the peace. R. S. 1899, sec. 6517; R. S. 1899, sec. 3857; 6 Missouri Digest, 58-69; Robbins v. Conley, 47 Mo. App. 502; Dillard v. Railroad, 58 Mo. 69. (4) A corporation and an individual cannot become partners and operate a partnership business. Mallory v. Oil Works, 86 Tenn. 598; Bank v. Oliver, 62 Mo. App. 390; Hotel Co. v. Furniture Co., 73 Mo. App. 135; 2 Beach on Corp., sec. 843; Morawetz on Corp., sec. 421. (5) Instruction number one given at the instance of respondent should have been refused, because under said instruction respondent was not compelled to prove demand of payment and refusal. Ball v. Railroad, 62 Iowa 753; Palmer v. Palmer, 36 Mich. 488; Morrison v. Mullen, 34 Pa. St. 12; Jamison v. Jamison, 72 Mo. 640. (6) Defendant's instructions numbers D and 3 should have been given because under the law of this State, a justice of the peace had no jurisdiction over this cause. R. S. 1899, sec. 6517; R. S. 1899, sec. 3857; 6 Missouri Digest, 58-69; Robbins v. Conley, 47 Mo. App. 502; Dillard v. Railroad, 58 Mo. 69. (7) Instruction one should have been given for the reason that a corporation cannot engage in a partnership business. Mallory v. Oil Works, 86 Tenn. 598; Bank v. Oliver, 62 Mo. App. 390; Hotel Co. v. Furniture Co., 73 Mo. App. 135; 2 Beach on Corp., sec. 843; Morawetz on Corp., sec. 421.

*William Baer and C. Lew Gallant* for respondent.

(1) There was no plea in abatement before the court. Before the justice of the peace, appellant filed what he termed a plea in abatement; before trial in the circuit court, appellant filed an amended answer, in which he set up by way of defense, not by abatement, the matter contained in his so-called plea in abatement.

This constituted an abandonment of his so-called plea in abatement; indeed, the matters embraced in said plea were matters of defense. But, even if there was a plea in abatement pending, appellant waived his right to a trial on it by not demanding a separate hearing thereon before trial begun. *Harrison v. Murphy*, 106 Mo. App. 465. (2) Respondent's petition filed before a justice of the peace on the first count was sufficient and stated a good cause of action on an account stated. *May v. Kloss*, 44 Mo. 300; *Lustig v. Cohen*, 44 Mo. App. 271. (3) The court did not err in refusing to sustain appellant's demurrer to the evidence for the reason that respondent had split its cause of action against appellant. The evidence showed conclusively that all the matters embraced in the account stated and the transaction relative to the ring were brought in one suit. *Flaherty v. Taylor*, 35 Mo. 447; *Railroad & Trans. Co. v. Traube*, 59 Mo. 362; *Hoffman v. Hoffman's Executor*, 126 Mo. 497; *Grocer Co. v. Taggart*, 60 Mo. App. 389. (4) Respondent's instruction No. 1 states the law correctly. It has not met the approval of this court in the case of *Lustig v. Cohen*, 44 Mo. App. 274. There is no need of demand of payment and refusal before action may be maintained upon an account stated. Sec. 1575, R. S. 1899; *Fisher v. City of St. Louis*, 44 Mo. 482; *Battell v. Crawford*, 59 Mo. 215; *Harrison v. Lakenan*, 189 Mo. 581; 9 Am. and Eng. Ency. Law, p. 199. (5) The instructions in this case should not be considered here. There was no exception taken to them by appellant. The trial court can not allow exceptions to instructions unless they are saved at the time. Sec. 864, R. S. 1899; *Houston v. Lane*, 39 Mo. 495; *State v. Westlake*, 159 Mo. 669; *Ritzenger v. Hart*, 43 Mo. App. 183; *Barnes v. Lead Co.*, 107 Mo. App. 613. (6) The appeal in this case is frivolous and without a shadow of merit. Every proposition advanced by appellant has been decided adversely to him scores of times; he has cited cases in his brief wholly foreign to the issue it is pretended to support. In such a case

damages should be awarded. Sec. 867, R. S. 1899; Darby v. Jorndt, 85 Mo. App. 274; Watson v. Fehlig, 59 Mo. App. 275; Mfg. Co. v. Hoff, 62 Mo. App. 124.

**STATEMENT.**—Plaintiff in this action, commencing it before a justice of the peace, there filed a statement containing two counts; the first founded upon what is claimed to be an account stated, the second for the value of a diamond ring. The first count set out that the defendant is indebted to plaintiff in the sum of \$213.43 upon an account stated, had between plaintiff and defendant on or about February 8, 1908; that plaintiff demanded from defendant that amount; that defendant failed to pay the same; that it is now due and payable, and for which plaintiff demands judgment. The second count avers that plaintiff delivered to defendant "on memorandum," a ring of the value of \$167.50; that plaintiff demanded the return of it or of its value, neither of which demands defendant complied with. Judgment is asked for the value of the ring, \$167.50.

The defendant filed what he calls "a plea in abatement," in which he states by way of abatement, that the party plaintiff is not the right or lawful party to the suit; that defendant never had any business transactions with plaintiff but that all business transactions that the defendant ever had concerning the matters and things mentioned in the first and second counts of plaintiff's petition were with one Henry Gallant, wherefore defendant moves the court to determine the plea in abatement and to dismiss the cause. On judgment against him in the justice's court, defendant appealed to the circuit court and there filed his answer, which, after a general denial of all the allegations in the petition or statement, sets up for a defense for the first count, a denial that there was ever any account stated between plaintiff and defendant at any time. As a further defense to the first count, defendant "states that he

is not aware that he ever had any business transactions of any nature with said plaintiff, the Union Loan, Storage & Mercantile Company, but that he did have business transactions with one Henry Gallant, whom he has since learned was the president of the plaintiff, in the matter of a partnership during the months of November, December, 1907, and January, 1908, in which partnership property was sold for \$231.25 and the expense of said partnership amounted to \$263.98, leaving a loss in said enterprise in the sum of \$32.75, one-half of said loss of, to-wit, \$16.36, being now due and unpaid by said plaintiff, for which said plaintiff is justly indebted to said defendant."

For a defense to the second cause of action the defendant renews his statement that he was not aware that he had any business transactions of any nature with the plaintiff but that he did have with Gallant, whom he had since learned was the president of the plaintiff, and that he received the ring in question from Gallant, sold it for \$162.56, for which he was allowed a commission of all over \$160; that Gallant, as president of the plaintiff "or otherwise," received and accepted jewelry from defendant in the sum of \$80 at one time, and merchandise in the sum of \$27 at another time, and again, as president of the plaintiff "or otherwise," procured and had in his possession 18 to 25 boys' knee suits, belonging to the defendant, of the value of \$2.50 each, "which suits, as president of the plaintiff or otherwise, he refused to return or account therefor." Defendant avers that there is a balance due him from plaintiff of \$19.50, "for which said sum the said plaintiff is justly indebted to said defendant."

The case being called for trial before the court and jury in the circuit court, and a witness being placed upon the stand by the plaintiff, defendant's counsel objected to any evidence being introduced on the first and second counts of this petition because they do not state a cause of action nor that the defendant ever promised

to pay the plaintiff. The objection was overruled, defendant excepting, whereupon the witness, in answer to a question, gave his name, and counsel for defendant thereupon interposed the further objection to anything being tried in this case "as to the amended answer, and ask that the question of the plea in abatement be tried alone in this case." This was overruled, defendant excepting. The witness thereupon proceeded with his testimony. Evidence tending to show that the plaintiff company had been incorporated and doing business for between eleven and twelve years, at 1416 Market street, St. Louis, was introduced by plaintiff, the president of the company, Mr. Gallant, testifying that he knew defendant, had known him for twelve years; that the plaintiff company had had business with defendant in the fall of 1907, when defendant came to their store and got merchandise and also the diamond ring and some other diamonds on consignment. On the second Saturday of February, 1908, defendant came to the store of plaintiff, when what was claimed to be the account stated was made up, amounting to \$219. Defendant and the men in the store of plaintiff checked off his account item by item with defendant and the amount arrived at was about \$219, and defendant said he had some goods in his store which belonged to plaintiff company and he did not wish to keep the goods. He was told he might return them and they would give him credit for them, and a couple of days later he returned something like five dollars' worth of goods. Mr. Gallant asked him for a check for the amount and also for the return of the diamond ring or its value, \$167.50, and defendant said that right now he did not have a dollar to his name; that he would certainly pay every dollar he owed them but they must give him a little time. There was a long examination of this witness and a very protracted cross-examination, the account between the parties and this paper called "the account stated" being introduced in evidence and also the account for the diamond ring, all

these accounts being made out on billheads of the plaintiff, and sent or delivered to defendant. Testimony of other witnesses for plaintiff tended to corroborate this. Evidence on the part of plaintiff was also to the effect that it had large gilt signs, with large, conspicuous letters, with the name of the plaintiff company in full, and signs over the front of the building and in the windows, with the plaintiff's name on them and that these were all there for between eleven and twelve years.

At the close of plaintiff's testimony the defendant interposed a demurrer to the evidence under both counts of the statement or petition which the court refused to give.

On the part of defendant there was evidence tending to show that the transactions defendant had had were with Mr. Henry Gallant and that there was nothing said as to whom he was representing, only defendant said he knew he was "the boss." Defendant testified he could not read English. He denied acceding to the account or admitting any indebtedness. While defendant was on the stand he was asked by his counsel, if he was sued for merchandise after the transactions of December 4, 1907. He said he was. The court, on motion, struck this answer out and then asked counsel for the defendant, if the question was simply whether or not there was a suit for \$140 by plaintiff against defendant, another suit than the present one, and the court asked counsel whether he, in any way, connected that with the items in the account stated. Counsel answered that the only reason for offering this evidence was to show that the plaintiff had split its account, whereupon the court renewed its ruling sustaining the objection, defendant excepting. There was great conflict between the witnesses on each side, one set testifying to one state of facts and the other to another, but no substantial testimony to prove any so-called splitting of accounts. That is, the court ruled that the testimony offered on that had no tendency to prove it.

At the conclusion of the evidence the court gave two instructions at the instance of plaintiff. The first submitted the question to the jury as to whether it appeared from the evidence in the case that on or about February 8, 1908, plaintiff and defendant had an accounting and settlement, between them, and if the jury found from the evidence that a settlement had then been had between them, "and that it was found and agreed between plaintiff and defendant that the sum of \$213.43 was due plaintiff by defendant, and that no part thereof has since been paid, then you will find for plaintiff and assess its damages at the sum of \$213.43." The second instruction given was to the effect that if the jury found from the evidence that plaintiff delivered to defendant a diamond ring to be returned by defendant on demand and in event of failure to return the ring that defendant should pay plaintiff the sum of \$167.50, if they found from the evidence that plaintiff did make demand on defendant for the return of the ring and defendant failed and neglected to return it, and if they found from the evidence that defendant has not paid plaintiff the sum of \$167.50, the verdict should be for the plaintiff for that amount.

On the part of the defendant the court instructed the jury that if they found that defendant had paid plaintiff in jewelry and merchandise mentioned in his answer to the second count of the petition, and that plaintiff had received the jewelry and merchandise in payment for the ring in question, they should find against plaintiff and in favor of defendant on the second count. The defendant had asked to insert after the word "plaintiff," in the above instruction, the words "or Henry Gallant." The court, however, struck these out, defendant excepting. At the instance of defendant the court also gave three other instructions, one as to the credibility of witnesses, the other as to the burthen of proof being upon the plaintiff, and another defining what burthen of proof meant. The defendant asked a



number of other instructions which are not necessary to set out in detail, beyond saying that one of them was to the effect that if they found from the evidence that the defendant believed he was dealing with Henry Gallant and not with the plaintiff and that Gallant represented he was the party in question, interested in such transactions, and that nothing was said by him until after said transactions, that he was representing the plaintiff, they should find for the defendant on his plea in abatement. Another request of the defendant was that the court instruct the jury that if they found from the evidence that plaintiff split its account, or accounts, and sued before the justice of the peace in the city of St. Louis on them, the plaintiff cannot maintain this suit. Another was to the effect that if the jury found that the account sued on in the first count was on the partnership venture of the plaintiff and defendant and that the partnership did not sell and take in enough to pay the expenses of the partnership venture and that plaintiff is indebted for its part of the expense of the partnership venture, the jury should find for the defendant on the first count of the petition. Another instruction was to the effect that although the jury might find from the evidence that there was no partnership agreement between plaintiff and defendant, before they could find for plaintiff on the first count, they must first find that there was an account stated on the 8th of February, 1908, between plaintiff and defendant, and that the defendant agreed that the account stated in the first count of the plaintiff's petition was true and that he then and there agreed to pay the account so stated. Another instruction asked was to the effect that a person who has an account against another for over five hundred dollars cannot split his causes for the purpose of bringing them in a justice of the peace court, and if the jury believe that at the time of the commencement of the suit in question the

plaintiff claimed that defendant owed him on various accounts a sum exceeding five hundred dollars, they cannot find for plaintiff in this cause but must find for the defendant. Finally, the court was asked to instruct the jury that a corporation cannot enter into a partnership agreement with an individual and that if they believed from the evidence that the plaintiff entered into a partnership agreement to carry on a store on "Dago Hill," the court instructs the jury that such an agreement was and is void and plaintiff cannot recover on the first count of its petition.

The bill of exceptions in the record shows that the defendant duly saved exceptions to the refusal of the court to give the instructions asked by him and to the giving of the instructions which were given at the instance of plaintiff. When the bill of exceptions was being made up plaintiff moved to strike out this notation of these exceptions, introducing the official stenographer, who testified that when the court passed on the instructions, counsel for defendant, so far as shown by his notes, had said nothing about excepting. The trial judge, however, overruled the motion and permitted the notation of exceptions to stand in the bill of exceptions, stating that he did so for the reason "that it is always customary to consider exceptions saved by defendant to all instructions given on behalf of plaintiff, and exceptions saved by plaintiff to all instructions given on behalf of defendant." This ruling was excepted to by the plaintiff. After filing a motion for new trial and also one in arrest, both of which were overruled and exceptions saved, defendant has brought this case here on appeal.

REYNOLDS, P. J. (after stating the facts).—The points relied on in the brief of counsel for appellant are: First, that the merits of the plaintiff's case are not proper subjects of inquiry on a plea in abatement, and the plea in abatement must be determined before the

other issues are tried; second, that the court erred in admitting any evidence under the first count of respondent's petition, because the first count does not state a cause of action in that it fails to state that the defendant promised to pay, and that such allegation was necessary to constitute good pleading; third, that the court erred in failing to sustain the demurrer interposed by appellant at the close of plaintiff's case in chief, as the evidence showed that respondent had split its account against appellant; fourth, that a corporation and an individual cannot become partners and operate a partnership business; fifth, that the instructions given at the instance of respondent should have been refused because under said instructions respondent was not compelled to prove the demand of payment and refusal; sixth, defendant's instructions on the issue as to whether plaintiff had split its account and the instruction to the effect that a corporation could not engage in a partnership business were improperly refused.

Taking up these assignments in their order, it is sufficient to say that what is called a "plea in abatement" and which was filed with the justice of the peace, had no place here. All the matters set up in that were in the answer and properly so, for considering the averments in this so-called plea in abatement as most favorable to defendant, they, in law, amount to nothing more than a denial of indebtedness of the defendant to plaintiff, and the issue tendered by this so-called plea in abatement contained in the answer was nothing more than could have been given in under the general denial and did not require or justify a separate trial from the trial of the merits. It may also be said that this denial of any dealing with the plaintiff and averment that all the dealings were with Mr. Gallant, are hardly consistent with the parts of the answer which set up counterclaims in favor of defendant and against the plaintiff. Consistency is very important when one appeals to a court for relief.

As to the second proposition that it was error to admit any testimony under the first count because it did not state that appellant had promised to pay, a complete answer to that is contained in the decision of this court in the case of *Lustig v. Cohen*, 44 Mo. App. 271, where Judge ROMBAUER, speaking for this court, and referring to the case of *Newberger v. Friede*, 23 Mo. App. 631, and *May v. Kloss*, 44 Mo. 300, says that while it is necessary in an action in the circuit court to state in the petition, when declaring on a stated account, that the defendant promised to pay the balance as found to be due, that this rule does not apply in actions brought before a justice of the peace where formal pleadings are not required.

As to the third proposition, that the court erred in not sustaining appellant's demurrer because the evidence shows that respondent had split its account against appellant, it is sufficient to say that there is no evidence to justify any such instruction. There was no proof of any splitting up of a single cause of action, within the meaning of the rule which forbids that. According to the defendant's own testimony, the transactions between him and plaintiff were entirely separate and distinct. They were divisible; each demand or transaction was subject to a distinct and separate action. [*Flaherty's Admr. v. Taylor*, 35 Mo. 447; *Alkire Grocer Co. v. Tagart*, 60 Mo. App. 389.] As to the remaining points covering alleged errors in refusing instructions, it is sufficient to say that they were properly refused. They either did not state the law correctly, or were covered by those given, or were not supported by evidence in the case. Nor is there any error in the action of the court in the instructions which it gave at the instance of the plaintiff. They stated the law in a very concise and absolutely correct form as applicable to the facts in this case. Plaintiff's counsel urge that the exceptions noted in the bill of exceptions before us, to the giving and refusal of instructions, are not properly in that bill.

While it is true that exception must always be saved at the time when the error complained of is committed, it is to be borne in mind that this rule is more immediately for the protection of the trial court. The learned trial judge in this case, in overruling the motion to strike out these exceptions, announced that it was the well understood rule of his court that counsel were assumed to have excepted to the ruling of the court in the giving and refusal of instructions. This was a matter ordinarily so entirely within the discretionary power and control of the trial judge that when following that custom he has allowed the exceptions and embodied them in the bill which he has signed, this court will not interfere with or comment on that action in any way, further than to say that it was entirely within his power to do so. As presented in the bill of exceptions here before us, it is tantamount to a finding by the learned trial judge that he allowed exceptions and that they had been duly preserved.

We are not deciding that if the bill of exceptions fails to note exceptions to rulings or acts at the trial or in the progress of the cause, we will allow it to be corrected here by showing that the rules of court assumed that exceptions had been taken to all adverse rulings. We are placing this decision on the facts here in the record, and on no other supposable case.

We are asked to inflict the statutory penalty for a vexatious appeal in this case. While we have disposed of the points made by the learned counsel for the appellant in rather a summary manner, we have done so because we think they are traveling over ground, the law of which is fairly well defined, as covering the points that they have made. Evidently the appeal in this case was taken in absolute good faith and the points made are well argued. It does not present a case calling for the infliction of the statutory penalty for vexatious appeal. The judgment of the circuit court is affirmed. All concur.

**PATRICK H. CLARKE, Sheriff, Respondent, v.  
GEORGE N. COOPER, Appellant.**

**St. Louis Court of Appeals. Argued and Submitted April 6, 1910.  
Opinion Filed April 19, 1910.**

1. **APPELLATE PRACTICE: Change of Parties.** Where one as sheriff brought an action and pending the proceedings his successor in office was substituted in his place, the title of the cause should be changed accordingly in the appellate court.
2. **JUDICIAL SALES: Title of Purchaser.** In the absence of fraud, surprise, or misunderstanding, the purchaser at an execution sale takes the title sold, at his peril.
3. **——: Advertisements: Description of Premises: Corner Lot.** A statement in an advertisement for the sale of a lot under an execution that it was a corner lot was no part of the description.
4. **NOTICE: Constructive Notice.** One has no right to shut his eyes to facts easily ascertainable and then claim to escape the consequences, nor has one the right, knowing the facts or having every opportunity to know them, to accept from another a misstatement and then claim the benefit of it.
5. **JUDICIAL SALES: Notice of Sale: Description of Property: Mis-Recital in Advertisement: Corner Lot.** The advertisement of a lot sold at execution sale stated that it was a corner lot on Grundy street, and the deed tendered the purchaser conformed to the levy and advertisement, but the lot was not in fact a corner lot. There was a point on a certain survey of the subdivision which was designated Grundy street, and it could have easily been determined by slight investigation whether the street was opened or dedicated, and the lot could have been located. The purchaser lived within five or six blocks of the lot, and was familiar with the neighborhood, and had passed the lot, but claimed that he relied upon the statement in the advertisement that it was a corner lot, and was misled thereby into bidding a higher price than it was worth as a non-corner lot. *Held*, that the purchaser could not rely on the misstatement in the advertisement and deed that the lot was a corner lot to avoid the sale or justify his refusal to accept the lot.
6. **——: Mistake of Purchaser as to Value.** A failure or mistake in value of the thing purchased at a judicial sale is not ground for setting the sale aside.

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Clarke v. Cooper.

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7. **SALES: Mistake of Vendee as to Value.** A mistake in value of the thing purchased is rarely a ground for setting aside any sale, except where there is positive proof of fraud or deception by which the vendee was induced to give a larger price for the article purchased than it was worth, or where the imposition in value is so great as to shock the conscience.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

AFFIRMED.

*Albert C. Davis* for appellant.

(1) The doctrine of *caveat emptor* does not apply to the case at bar. *McLean v. Martin*, 45 Mo. 393; *Wilchinsky v. Cavender*, 72 Mo. 192; 25 Am. and Eng. Ency. Law (2 Ed.), p. 844, note d. (2) If a careful purchaser has been led into mistake by the conduct of the seller, the court should not hold the sale void. *Owsley v. Smith's Heirs*, 14 Mo. 153; *Swartz v. Dryden*, 25 Mo. 572; 24 Cyc. 41. (3) The court refused to relieve appellant from his bid even if the court found from the evidence that appellant was misled by the advertisement of the sheriff and was damaged by the mistake. This was error. Cases cited under point 1.

*Zachritz & Bass* for respondent.

(1) Revised Statutes 1899, p. 799, sections 3202 and 3203, "provide that if a bidder at an execution sale refuses to pay the amount of his bid for property struck off to him, the officer making the sale may again sell to the highest bidder, as though no previous sale had occurred, and, if loss results, the amount of such loss may be recovered on motion before a court or justice in a summary way." (2) The purchaser at an execution sale buys at his peril, and must beware of his title, and cannot be excused from answering any damages for refusing to complete the purchase because the property was incumbent by easement, or because at

the second sale, the officer making it expressly notified bidders of the easement. *McNamee v. Cole*, 114 S. W. R. 46.

REYNOLDS, P. J.—The respondent in this case, at the time sheriff of the city of St. Louis, having in hand a pluries writ of execution, issued out of the circuit court of the city of St. Louis, levied upon the right, title, claim, interest, estate and property of one Green, defendant in the execution, describing the property as follows: "A lot of land situated in the city of St. Louis, in the State of Missouri, and in block 2924 of said city, having a front of sixty (60') feet and six (6'') inches on the west line of Minnesota avenue by a depth westwardly between parallel lines of 147 feet and 11' inches; bounded north by Grundy street, south by land now or formerly owned by Mary O. Cummysky and trustee, east by Minnesota avenue and west by a line parallel to Minnesota avenue." This is in that part of the city formerly called Eiler's Subdivision of Carondelet. Legal notice of the sale being published, one Cooper, appellant here, bid off the property for the sum of \$300. The sheriff executed a deed to Cooper for the property, described it as in the advertisement and levy as above and tendered it to the appellant, who refused to receive the deed or to pay the amount bid for the property. Whereupon the sheriff re-advertised the property under the same description, as we understand, as in the first advertisement, and sold it to one Hereford, at the price and sum of thirty-five dollars. Subsequently the sheriff, proceeding under the provisions of section 3202, Revised Statutes 1899, moved the court for a judgment against Cooper for the difference between the amount of the bid, to-wit, \$300, which had been made by Cooper, and the amount bid by Hereford, to-wit, \$35, making a loss of \$265, also demanding the cost of advertising the second sale which amounted to \$56. Cooper answered, admitting that he had made the bid of \$300, admitting that the lot was



struck off to him and that the sheriff had tendered him a deed conforming to the levy and advertisement, but averring that the description contained in the advertisement made the lot a corner lot and that according to that advertisement it was situated on the southwest corner of Minnesota avenue and Grundy street, and that it was announced at the sale by the deputy sheriff, who cried it, that the lot was on the southwest corner of Minnesota avenue and Grundy street and that he (Cooper) bid upon the property believing that fact to be true, whereas in truth and in fact, as he claims in his answer, it was not a corner lot, was not bounded on the north by Grundy street; that there is no Grundy street, or any other street bounding the lot on its northern line, and that if the lot had been a corner lot it would have been of a much greater value than is the lot in its actual location.

At the proceeding under the motion, the present sheriff, Mr. Nolte, was substituted in place of Mr. Clarke, but the title of the case has not been changed in this court, as it should have been. Appellant in support of his claim, introduced as a witness a Mr. Ryan, who testified that he was a title examiner in the city of St. Louis. Mr. Ryan was asked if he had heard the description of the property read as it is described in the petition in the case, and he said he had. He was asked if he had examined the title to that property and he answered that he had. Asked if he had made a special examination as to this piece of property with reference to whether there is any Grundy street on the north of it, he testified that he had examined through the ordinary channels of a title examiner, and that there is represented on the plats in the special tax department a street called Grundy street but that the property covered by this street is assessed in the names of individuals; that he found no formal dedication or opening of Grundy street of record. Asked if there was anything upon the record to show that there ever was contemplated to lay out

a Grundy street there, he answered: "There was something on the records to show there was evidently at one time contemplated Grundy street," but according to the surveys laid out by Eiler, who laid off the subdivision in which the lot is situated, the street is represented as being closed owing to the fact that the block "didn't have sufficient width;" found nothing on the record to show that it had ever been opened. On cross-examination he stated that he couldn't say from an examination in the special tax department, of the plats there on file, that they show a street; that Grundy street is represented on these plats as thirty-six feet wide, not represented exactly as a street, but there is written on the plat at that place, "Grundy street, thirty-six feet," but there are no dotted lines, and so far as his examination went, he found no dedication of it but that the records do show that sometime back it had been contemplated putting a street through there to be called Grundy street; that there was a survey of the town of Carondelet by Eiler, in 1832, wherein it states that "'G' street is entirely shut up owing to the circumstance that there was not sufficient ground for the blocks, for these streets to maintain their proper width," 38 feet, English measure. This was all the evidence introduced by the appellant in chief, who under the ruling of the court had the affirmative and was given the opening and closing of the case. Respondent then called the deputy sheriff who had made the sale; he testified to the fact of making the sale and that Mr. Cooper was the bidder for \$300, and the deed was tendered him properly executed, and Mr. Cooper refused to pay the \$300; that the property was re-advertised and at the second sale sold for \$35 to Mr. Hereford, who was the highest bidder, and that the additional costs were \$56. The execution was offered, it being admitted that the sheriff had acted under a good and valid execution, as pleaded. Respondent here rested and appellant in rebuttal was examined as a witness on his own behalf and testified that he was a real estate agent; had been

in that business for about eight years; had bid \$300 on this property; had read the advertisement and that had stated it was a corner lot and he supposed it to be such. If it had been a corner lot it was worth twenty dollars a foot but as an inside lot he would not consider it worth more than eight dollars a foot. On cross-examination he stated that he had read the description in the advertisement before he made the bid; read it the same day; called at the sheriff's office on the morning of the day of the sale at about 9 o'clock; made some inquiries about the lot and then came back at noon time and bid the lot in at the sale. Asked if he had ever visited the premises, or ever sent down to inquire or to see whether or not it was a corner lot, he answered that he was familiar with the property down there himself, living in that neighborhood, and within five or six blocks of this property and knew the property from having passed it occasionally and knew just where it was and what it was; knew that before he made the bid. He said, however, "but from the 'ad' I judged it would be a corner lot; if it was bounded by two streets it would naturally be a corner lot." Asked by the court if he was familiar with the neighborhood, appellant said he was; did not know whether or not Grundy street existed; it might be a street and not be traveled, might be a street of record. The court then said to him, "But as you were familiar with this neighborhood and the property in the neighborhood, how did it happen you didn't know there was no such street?" Appellant answered, "The street is blocked by the next street west; there was no way of driving through, but as it (the advertisement) states it, it is bounded by a street and I thought the street was there and could be opened." In answer to questions of counsel for respondent, the appellant stated that this Grundy street is blocked on the east by Michigan avenue, which is the next street west of Minnesota avenue and one block west of it. He was then asked by

the court this question: "Omitting the reference to Grundy street, how would the description stand?" He answered, "It is bounded north by a private party instead of being bounded north by a private street; it is a lot in the middle of the block." Counsel for respondent, resuming his cross-examination, asked appellant if it was not a fact that it was bounded on the east by Minnesota avenue, on the south by land now or formerly owned by Mary Cummysky, on the west by a line parallel to Minnesota avenue. He answered that that was true and that the dimensions of the property are properly given. This was all the evidence in the case. Whereupon the appellant asked the court to declare the law as follows:

"If the court finds from the evidence that the sheriff levied and advertised the execution sale upon the property described in the petition as a corner lot and that the defendant bid upon said property under the mistaken belief that said lot was a corner lot and that said lot was not a corner lot and that defendant was misled by said advertisement of the sheriff and that said property is of much less value than it would be if it was a corner lot, and that defendant would suffer injury by reason thereof, the judgment will be for the defendant."

The court refused this declaration of law and finding for respondent, entered up a judgment against appellant for \$321 and costs of the motion. Appellant filing his motion for a new trial and that being overruled afterwards filed his bill of exceptions and brought the case here on appeal, saving exception to the refusal of the declaration of law asked and overruling of the motion for a new trial.

The learned circuit judge filed a memorandum of his conclusions which is embodied in the record, having been preserved by the bill of exceptions. That finding gives a very clear idea of his views. We cannot do any better than quote extracts from it. After reciting the issues the judge states that under the statute judg-

ment must be given in favor of the sheriff for the loss occasioned by the resale, unless the defense interposed by appellant Cooper should be held sufficient, citing as to the measure of damage the case of *McNamee v. Cole*, 134 Mo. App. 266, 114 S. W. 46. The court continues:

"It is admitted that the property is accurately described in the advertisement by virtue of which it was sold to defendant, but the recital therein that the property was a corner lot on Grundy street was erroneous.

"Defendant testified that he knew the property, had seen it, and knew the neighborhood where the property was located, and at the time of the sale he was residing not far from where the property was situated and that he passed the property in question frequently. Therefore, it appears that he was not a stranger to the property and its location. From personal inspection he could have learned the boundaries of the property, and also whether such a street as Grundy street in fact existed.

"The question then arises, was Cooper justified in relying on the erroneous recital in the advertisement that the property was a corner lot, and for this reason more valuable, rather than on his own knowledge touching the precise location of the property. If he had possessed no other information at the time of his bid concerning the situation of the property than what he derived from the advertisement, defendant's claim that he was misled would have had a stronger basis to support it.

"It is not unreasonable to conclude that defendant did to some extent rely on his own knowledge of the property. Indeed, the circumstances which appear in evidence require him to do so. However, in this proceeding his position appears to be that he insists that he was justified in relying solely on the advertisement in its statement that the property was a corner lot. He says that had he known at the time of his bid that the

property was not a corner lot he would not have bid on it, and that as soon as he learned this fact he declined to take the property.

"In the absence of fraud, surprise or misunderstanding, the general rule is that the purchaser buys at his peril and must beware of his title. The facts in this case are not sufficient to support a claim of fraud. If the defendant was misled or surprised it resulted from his own fault. The property was correctly described and the title was good. The statement that it was a corner lot was no part of the description.

"The recent case of the St. Louis Court of Appeals, *McNamee v. Cole*, 134 Mo. App. 266, 114 S. W. 46, applies the general rule that at execution sales the purchaser buys at his peril and must beware of his title and cannot be excused from responding in damages because the property was encumbered by easements.

"The defense in the case at bar cannot be sustained."

In addition to what is so well said by the learned circuit judge, both as to the facts in the case and as to the principles governing it, with all of which we agree, we refer to the decision of our Supreme Court in *Owsley et al. v. The Heirs of Smith*, 14 Mo. 153, where Judge NAPTON, delivering the opinion of the court, at page 153, says: "It is not to be presumed that a purchaser of a tract of land will attend a sale of this description, without a proper examination of the title as well as the land itself. The records of the county are open to the inspection of all, and upon these records every objection now urged to this title was to be found." The learned counsel for appellant refers us to *Schwartz v. Dryden*, 25 Mo. 572, as well as to Cyc., vol. 24, p. 41, and 25 Am. and Eng. Ency. of Law (2 Ed.), p. 844, noted and also to the cases of *McLean v. Martin*, 45 Mo. 393, and *Wilchinsky v. Cavender*, 72 Mo. 192, as authority for the

propositions upon which he now relies, namely, that the doctrine of *caveat emptor* does not apply to the case at bar, and that if a careful purchaser has been led into mistake by the conduct of the seller, the court should hold the sale void; it being further contended by that counsel that the court committed error in refusing to relieve appellant from his bid if it found from the evidence, as it must have done, that appellant was misled by the advertisement of the sheriff and damaged by the mistake. These authorities do not meet the facts in this case. It is laid down in the Cyclopedia, at the paragraph referred to, that a judicial sale may be set aside where there has been a mistake or some surprise in connection with the sale, resulting in injury. The American & English Encyclopedia is to the same effect. An examination of some of the cases referred to in these works hardly sustains counsel in his petition. Thus in the case of *Hayes v. Stiger*, 29 N. J. Eq. 196, one of the cases referred to in the footnote to 24 Cyc., p. 41, it is held that when the mistake of fact is the result of the purchaser's own negligence, even a court of equity will not relieve him. In the case of *Mechanics' Savings & Building Loan Assn. v. O'Conner*, 29 Ohio St. 651, another case referred to in the notes in the Cyclopedia, it appears that the commissioner who made the sale and the bidder at the sale supposed the lots offered at the commissioner's sale were dry. It developed that they were wet and subject to overflow. The Supreme Court of Ohio said, in deciding the case, that it was true the defendant who had purchased at the commissioner's sale, did not buy such lots as he supposed he was buying; that it may be true that the commissioner, or plaintiff in the suit at whose instance the sale was made, also believed that the lots offered for sale were dry. "This however," says the court, "does not make such a case of mutual mistake as vitiated the contract. The mistake was simply as to the character or quality of the lots. The sale was a judicial one, and the purchaser was

charged with the duty of ascertaining for himself the character and condition of the property. This it failed to do, and for such neglect, it stands as though it had full knowledge in the premises."

The case of *McLean v. Martin*, supra, which the circuit court in the case at bar held did not apply in its facts, was a case where there had been such a misdescription of the property sold at the judicial sale that the purchaser acquired nothing whatever. The advertisement told him he was buying the northeast quarter and that that was the property of the defendant in execution, whereas in point of fact the defendant in the execution owned and lived upon the northwest quarter and the purchaser at the sale received nothing whatever for the money which he bid and paid out and which went to the benefit of the defendant in the execution. The latter lost nothing and received credit for that to which he was not entitled. The court held that under these circumstances he was bound to pay back the money.

The facts in the *Wilchinsky* case, supra, are not fully set out, but that decision rests on the *McLean* case, Judge NAPTON, who delivered the opinion in both cases, saying that it had been held in the *McLean* case that the doctrine of *caveat emptor* had no application where a mistake was made both by the sheriff and the purchaser in selling a tract of land to which the defendant in the execution had no title and that the consideration for the money paid on the execution having failed and the money paid in on the sale having gone to extinguish the judgment against defendant, plaintiff was entitled to recover it back from the defendant in the execution. It will be seen that neither of these cases meets the case at bar.

*Schwartz v. Dryden*, supra, relied on by the learned counsel for the appellant, strikes us as directly opposed to that counsel's position. Quoting merely the syllabus of the case, which is a correct statement of the case itself, it announces as the law applicable to judicial sales, first,



that there is no warranty of title, even in sales in partition proceedings; secondly, that where the parties to a statutory proceeding for partition "have no title to a portion of the land, a purchaser, at the partition sale, of such portion—there being no fraud or misrepresentation—will not be entitled to have such sale set aside as to such portion on the ground of this want of title." That is not this case, for several reasons: First, the description in the deed was not such a misdescription as would have voided the title to the lot sold if the defendant had chosen to accept the sheriff's deed. The test of that would have arisen if there had been possession of the lot in question by some one claiming right to possession adverse to the purchaser at the sheriff's sale and who had resisted the entry of the purchaser, the latter claiming under the deed from the sheriff. Could it be successfully contended that there was such a misdescription of the lot as to have made the deed that the sheriff had given to the purchaser unavailable by reason of a misdescription of the property? Clearly not. Even defendant's witness, the title examiner, testified that he located the lot from the description in the petition, which followed that given by the sheriff. Again, appellant was not a "careful purchaser." A man has no right to shut his eyes to facts easily ascertainable and then claim to escape the consequences. Nor has he the right, knowing the facts himself or having every opportunity to know them, to accept from another, a misstatement, knowing or having an opportunity to know, that it was a misstatement and then claim the benefit of that misstatement. He cannot hold the other responsible for the effect of the misstatement, when his own knowledge told him it was a misstatement. One cannot shut his eyes to facts that he knows and then hold him who has innocently erred, responsible for error. Nor can he, going into an enterprise with his eyes shut to

what he has seen and what his eyesight had shown him, draw out of it because it so happens that the party who invited him into it did not have the same information that he had and hence had made a misstatement as to the facts in the case. There is no pretense that the sheriff knowingly or fraudulently made any misstatement. Nor are we satisfied, from the evidence in this case, that there is no Grundy street. Whether such a street has been opened or dedicated or exists, it is very clear that there was a point on the plat of Eiler's survey of Carondelet which was marked and designated by the name of Grundy street; whether it was an open street or not could have been determined by anyone making the slightest search. Nor would they have had any trouble whatever in determining whether it had been dedicated as a street or in locating this particular lot. After all, when you come to the ultimate fact in the case, it appears to us that the defendant's proposition rests on a failure in value in the article he bought. That is no ground whatever for setting aside a judicial sale; in fact, it is rarely a ground for setting aside any kind of a sale, save in the presence of most positive proof of some fraud or deception by which a party was induced to give a larger price for an article than on any possible hypothesis that article was worth, or where the imposition in value is so great as to shock the conscience. On consideration of the facts and the law applicable to this case, we hold that the judgment of the circuit court was right and it is affirmed. All concur.

**PATRICK H. HALLORAN, Appellant, v. THE PULLMAN COMPANY, Respondent.**

St. Louis Court of Appeals. Argued and Submitted April 6, 1910.  
Opinion Filed April 19, 1910.

1. **MASTER AND SERVANT: Injury to Servant: Safe Place to Work: Duty of Master.** A master must furnish his servant with a reasonably safe place in which to work, and he must exercise ordinary care to keep the place in a reasonably safe condition. The question of his negligence is determined by reference to the conduct of an ordinarily prudent person under like circumstances, and omissions which entail injuries, such as might have been anticipated by a reasonably prudent person, are negligent breaches of duty.
2. ———: **Negligence: Injury to Servant: Anticipating Result: Facts Stated.** A foreman in charge of car cleaners directed an upholsterer to repair a seat in the smoking room of a Pullman car. The upholsterer entered the car, which was dark, raised the sofa from the seat, and then rested it on his knee, and was about to put the stepping box under it when his right foot slipped and the cushion fell, catching the forefinger of his right hand between the stepping box and the frame of the sofa, crushing his finger. The floor of the car was sloppy. *Held*, that the master was not liable, because a reasonably prudent man would not have supposed that the water remaining on the floor of the car would have caused an accident to any one employed in working there.

Appeal from St. Louis City Circuit Court.—*Hon. Matt. G. Reynolds, Judge.*

**AFFIRMED.**

*Everett W. Pattison and Alfred P. Hebard* for appellant.

(1) The error which appellant assigns is that the trial court took the case from the jury by sustaining a demurrer to the evidence. The case is one showing that the defendant had not furnished its employee, the plaintiff, with a reasonably safe place in which to do his work.

This duty is one the master cannot delegate. *Jones v. Packet Co.*, 43 Mo. App. 398; *Schaub v. Railroad*, 106 Mo. 74; *Henry v. Railroad*, 109 Mo. 488; *Coontz v. Railroad*, 121 Mo. 652; *Browning v. Railroad*, 124 Mo. 55; *Railroad v. Tuck* (Tenn. Civ. App.), 116 S. W. 620, Affd. 123 S. W. 406. (2) The positive duty rests on the master to see that the place in which the employee is to work is a safe place. When plaintiff proves the existence of the defect, he makes out a case. It is then for the defendant, the employer, to show matters, if any there are, which exculpate him. *Parsons v. Railroad*, 94 Mo. 286; *Nicholds v. Crystal Plate Glass Co.*, 126 Mo. 55; *Gibson v. Railroad*, 46 Mo. 163; *Dedrick v. Railroad*, 21 Mo. App. 433; *Bartley v. Trorlicht*, 49 Mo. App. 214; *Gutridge v. Railroad*, 94 Mo. 468, 105 Mo. 520; *Rodney v. Railroad*, 127 Mo. 676; *Nash v. Pressed Brick Co.*, 109 Mo. App. 600; *Sackewitz v. Biscuit Mfg. Co.*, 78 Mo. App. 144; *Huth v. Dohle*, 76 Mo. App. 671.

*Sears Lehmann*, and *Lehmann & Lehmann* for respondent.

(1) (a) The defendant was not bound to furnish plaintiff a dry place, or an absolutely safe place in which to work; the defendant's obligation was to use ordinary care to furnish plaintiff a reasonably safe place in which to work. The master does not insure against danger and is liable for the consequence, not of danger, but of negligence. *Dickey v. Dickey*, 111 Mo. App. 304; *Chrismer v. Telephone Co.*, 194 Mo. 189; *Blundell v. Mfg. Co.*, 189 Mo. 552; *Leitner v. Grieb*, 104 Mo. App. 173; *Franklin v. Railroad*, 97 Mo. App. 473; *Wendall v. Railroad*, 100 Mo. App. 556; *Glasscock v. Swafford Bros.*, 106 Mo. App. 657; *Anderson v. Box Co.*, 103 Mo. App. 382; *Howard v. Railroad*, 173 Mo. 524; *Harrington v. Railroad*, 104 Mo. App. 663; *Stumbo v. Duluth Zinc Co.*, 100 Mo. App. 635; *Sinberg v. Falk Co.*, 98 Mo. App. 546; *Beebe v. Transit Co.*, 206 Mo. 419. Thus (b) when

the plaintiff proved the existence of a defect (if he did prove it) he did not make out a case, and it was not for the defendant to exculpate itself, for the presumption is that defendant had no notice or knowledge of the fact and was not negligently ignorant. *Franklin v. Railroad*, 97 Mo. App. 473; *Elliott v. Railroad*, 67 Mo. 272; *Covey v. Railroad*, 86 Mo. 635. (2) Defendant did nothing out of the usual course of its business whereby plaintiff was injured, and the plaintiff's injury was an accident for which defendant is not responsible. *Anderson v. Box Co.*, 103 Mo. App. 382; *Wendall v. Railroad*, 100 Mo. App. 556; *Dickey v. Dickey*, 111 Mo. App. 304; *Leitner v. Grieb*, 104 Mo. App. 173; *Cole v. Lead Co.*, 112 S. W. 753. (3) The mere fact that there was a small wet place on the floor would not make that a dangerous place in which to sew on a button, but even if this were true, and if in the teeth of the law and the evidence it were presumed that this danger was the result of negligence on the part of some one connected with defendant, even then plaintiff cannot recover, for if the evidence warrants the inference that anybody connected with the defendant was responsible for the wet spot it would be the defendant's car cleaners, and they were fellow-servants with plaintiff. *Forbes v. Const. Co.*, 198 Mo. 193; *Dickey v. Dickey*, 111 Mo. App. 304; *Jackson v. Mining Co.*, 106 Mo. App. 441; *Fox v. Packing Co.*, 96 Mo. App. 173; *Grattis v. Railroad*, 153 Mo. 380; *Parker v. Railroad*, 109 Mo. 378; *Relyea v. Railroad*, 112 Mo. 86.

REYNOLDS, P. J.—The plaintiff in this case, by occupation an upholsterer, while in the employment of the defendant, was directed to put buttons on the seat of a sofa in the smoking room of a Pullman car, that car at the time being in place in the Union Depot, in the city of St. Louis. He reached the car about 5 o'clock on the evening of April 13th and went into the car, which was dark, raised the sofa from the seat in the smoking room of the car with both hands and after he had raised it,

rested it on his knee, holding it by his knee and his left hand, and was about to put the foot box, or "stepping box," as he calls it, under it, and just as he did so, his right foot slipped from under him and the cushion falling, caught the forefinger of his right hand between the "stepping box" and the frame of the sofa, crushing his finger. Looking to see what had caused his foot to slip he found that the floor of the car was sloppy and had soapy water on it. He had gone to this place to work under the direction of a foreman, who was also foreman and had charge of the car cleaners. Plaintiff testified that in consequence of the injury to his finger, his hand is permanently maimed, and that he is unable to pursue his occupation of an upholsterer. This is practically the testimony of plaintiff in the case as to the accident, as also all the material evidence in the case, except that the plaintiff offered in evidence the charter of the defendant which it is unnecessary to notice.

At the conclusion of plaintiff's testimony, plaintiff resting, the defendant asked the court to instruct the jury, before which and the court the case was on trial, that under the pleadings and the evidence their verdict must be for the defendant. The court ruling that it would give this instruction, plaintiff took a nonsuit, with leave to move to set the same aside, which motion he afterwards filed and that being overruled and exception saved, he has brought the case here on appeal.

The errors relied upon by counsel for plaintiff are to the taking of the case from the jury under an instruction, and the contention that "the positive duty rests on the master to see that the place in which the employee is to work is a safe place. When plaintiff proves the existence of the defect, he makes out a case. It is then for the defendant, the employer, to show matters, if any there are, which exculpate him." Practically these assignments are identical. They are endeavored to be supported in a very clear brief by the learned counsel for the appellant who seem to be under the im-

pression that because the record is short that this court will not consider it a case worthy of attention. That is a mistake. The case presents very clearly the point as to whether the employer, under the circumstances stated, is liable by reason of plaintiff having sustained the injury which undoubtedly he did sustain, and the determination of that point is always of importance. It has often arisen and has been carefully considered by this court as well as by the Supreme Court and other appellate courts of the state. For that reason, and in no manner overlooking the very able brief of counsel, we do not think it necessary to go into an analysis of the cases, or to draw distinctions between those relied on and those we think applicable to this case. The question to be determined in this case and the only one in it, is whether or not the employer, assuming it to have been ordinarily prudent, would or should have anticipated danger in directing plaintiff, its employee, to work in this smoking compartment of the sleeping car; or assuming that the employer knew or should have known that the soapy water was on the floor, was bound to anticipate that there was a reasonable probability that the employee working on a floor in that condition would sustain injury. To put it briefly, could the employer in this case have reasonably anticipated that the accident would have happened to the plaintiff by reason of his being put to work in a car on the floor of which was this soapy water? We think that the principles applicable to and governing this case are clearly set out in the cases of *Wendall v. Railroad*, 100 Mo. App. 566, 75 S. W. 689; *Anderson v. Forrest-Nace Box Co.*, 103 Mo. App. 382, 77 S. W. 486; *Dickey v. Dickey*, 111 Mo. App. 304, 86 S. W. 909; *Cole v. North American Lead Co.*, 130 Mo. 253, 112 S. W. 753; *Harris v. Kansas City Southern Ry. Co.*, 146 Mo. App. 524, 124 S. W. 576.

As is said by this court in *Harris v. Kansas City Southern Railway Company*, *supra*, when treating of the duty of the employer to furnish his employee with a reasonably safe appliance with which to perform the services contemplated in the employment, but changing the language to fit the facts here, for the duty with reference to furnishing a reasonably safe place to work is like that governing the furnishing of reasonably safe appliances and tools, it may be said in this case that the rule obtains, generally, that it is the duty of the employer to furnish the employee with a reasonably safe place in which to perform the services contemplated in the employment and this duty continues to obtain to the end that the employer shall exercise ordinary care toward keeping such place where the work is to be done in a reasonably safe condition for the performance of the intended work. The question of negligence in respect to such matters is to be determined by reference to the conduct of an ordinarily prudent person under like circumstances. Omissions which entail injuries such as might have been foreseen or anticipated by a reasonably prudent person, as within the range of reasonable probabilities, are regarded as negligent breaches of duty in respect to the obligation referred to. The typical prudent man, whose conduct furnishes the standard to which the employer is bound to conform, is supposed to exercise a proper degree of care, not merely in observing existing conditions but also in forecasting future occurrences. See also *Labatt, Master & Servant*, secs. 140, 141, 142, and other authorities cited in the *Harris* case. Applying that to the facts here in evidence, as testified to by the plaintiff himself, we think it beyond question that no reasonably prudent man would have any cause to suppose that the water remaining on the floor of this smoking compartment of the Pullman car, even if it were soapy and presumably slippery, would have caused an accident to any one em-



ployed in working there. Its presence there was not of a kind of known or visible hazard such as would lead any one to suppose that it could, by any possibility, have caused a hurt to any one walking or standing on it, or working there.

The action of the circuit court in sustaining the demurrer to the evidence, which was practically what was done, and in refusing to set aside the nonsuit, is affirmed. All concur.

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JOSEPH P. KELLY, Admr. of MARY F. KELLY;  
Deceased, Respondent, v. THE PRUDENTIAL  
INSURANCE COMPANY OF AMERICA, Appel-  
lant.

St. Louis Court of Appeals. Argued and Submitted March 16, 1910.  
Opinion Filed April 19, 1910.

1. **LIFE INSURANCE: Assignment of Policy:** Subject to "Facility Clause" of Policy. Under an assignment by insured of a policy of life insurance, payable to insured's executors, administrators or assigns, and containing a "facility of payment clause" to the effect the company might make any payments provided for in the policy to any relative of insured, or to any person appearing to the company to be equitably entitled to the same by reason of having incurred expenses in any way on behalf of insured for his burial, which assignment on its face was made subject to the terms and conditions of said clause, the assignee's interest was subject to the right of the company to pay the amount of the policy to any person appearing to it to be equitably entitled to the same, by reason of having incurred expenses on behalf of insured for his burial, as provided in said clause.

2. ———: ———: ———: **Payment to Administrator for Burial Expenses.** Insurer in a life policy, authorizing it to pay the policy to any person equitably entitled thereto, by reason of having incurred expenses in behalf of insured for his burial or other purposes, may pay the policy to the public administrator who had taken charge of the estate of deceased and incurred expenses for his burial, whether he did so before or after the receipt of the money due on the policy.
3. ———: **Who May be Assignee.** One taking out a policy on his life payable to his executors, administrators, or assigns may assign it to any one standing in the position of creditor or dependent, and the assignee need not be a relative.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

REVERSED.

*Fordyce, Holliday & White* for appellant.

(1) The demurrer to the evidence offered by the defendant at the close of the case should have been sustained as the evidence showed that plaintiff's intestate, Mary F. Kelly, had no insurable interest in the life of the insured, and hence, the assignment to her was invalid. *Whitmore v. Supreme Lodge*, 100 Mo. 36; *Huesner v. Insurance Company*, 47 Mo. App. 336; *Insurance Company v. Richards*, 99 Mo. App. 88; *Bruer v. Insurance Co.*, 100 Mo. App. 540; *Insurance Co. v. Ellison*, 3 L. R. A. (N. S.) 934, and note; *Deal v. Hainley*, 135 Mo. App. 507. (2) The court erred in admitting, over the objection of defendant's counsel, the testimony of witness Rose Kelly, as to conversations taking place after the assignment of the policy, and, in the absence of the defendant or its agents, between the insured Brophy and the assignee Mary F. Kelly, both of whom were dead at the time of the trial. *Brown*

v. Insurance Co., 109 Mo. App. 135; Wojtylak v. Coal Co., 188 Mo. 260, *et seq*; Johnson v. v. Burks, 103 Mo. App. 221; Criddle v. Criddle, 21 Mo. 522; Perry's Administrators v. Roberts, 17 Mo. 36. (3) The court erred in admitting in evidence, over defendant's objection, the letter from plaintiff's counsel to defendant and reply of defendant's agent thereto. Authorities under point 2. (4) The court erred in excluding the evidence offered by defendant that it had paid the proceeds of the policy to the public administrator. Floyd v. Prudential Insurance Co., 72 Mo. App. 455; Thomas v. Prudential, 158 Ind. 463; Susquehanna v. Swank, 102 Pa. St. 17; Metropolitan v. Shafer, 50 N. J. Law 72 (11 Atl. 154); Metropolitan v. O'Farrer (Kas.), 67 Pac. 835; Ruoff v. Hancock, 86 App. Div. (N. Y.) 447; Pfaff v. Prudential, 141 Pa. St. 562; Brennan v. Prudential, 170 Pa. St. 488; McCarthy v. Metropolitan, 162 Mass. 254; Bradley v. Prudential, 187 Mass. 226, 72 N. E. 989; Golden v. Metropolitan, 55 N. Y. Sup. 143; Thompson v. Prudential, 104 N. Y. Sup. 257; Prudential v. Young, 43 N. E. 253 (Ind.); Thomas v. Prudential (Pa. 1892), 24 Atl. 82; The State (Metropolitan Life Co. (Prosecutor) v. Shaeffer, 50 N. J. Law 72, 11 Atl. Rep. 154 (8087); Lewis v. Metropolitan (Mass. 1901), 59 N. E. 439; McNalley v. Metropolitan (Pa. 1901), 49 Atl. 229; Maburg v. Metropolitan (Mich. 1901), 86 N. W. 1026. (5) The court erred in giving plaintiff's instruction. Lemaster v. Railroad, 122 Mo. App. 313, *et seq*; Sundmacher v. Lloyd, 114 Mo. App. 317; Stanfield v. Loan Assn., 53 Mo. App. 595, *et seq*; Laughlin v. Gerardi, 67 Mo. App. 372; Forster v. Guggemos, 98 Mo. 391; Rudd v. Insurance Co., 120 Mo. App. 1, l. c. 16. (6) The court erred in refusing defendant's instruction No. 1. Authorities under point 4. (7) The court erred in refusing defendant's instructions Nos. 2 and 3. Authorities under point 1. (8) The court erred in refusing de-

fendant's instruction No. 5. *Strode v. Meyer Bros. Drug Co.*, 101 Mo. App. 627; *Deal v. Hainley*, 135 Mo. App. 507, and authorities under point 5.

*Seneca N. & S. C. Taylor* for plaintiff.

(1) The court did not err in overruling defendant's demurrer to the evidence on the ground assigned by the defendant, nor on any other ground. The evidence undeniably shows that Mr. Brophy was largely indebted to Mrs. Kelly, and after taking out the policy upon his own life in his own favor, he assigned it to her on a blank furnished by the defendant for that purpose, and with the defendant's approval, his signature being witnessed by the defendant's agent. Obviously from the evidence, Mr. Brophy made such an assignment to her in payment of his indebtedness to her. Such being the facts, every well-considered case supports the action of the court in overruling the demurrer to the evidence. Quotations from the authorities upon which we rely may assist the court. *Ashford v. Ins. Co.*, 80 Mo. App. 641; *Van Cleave v. Union Casualty Co.*, 82 Mo. App. 682; *Reynolds v. Ins. Co.*, 88 Mo. App. 685; *Ins. Co. v. Francis*, 94 W. S. 561; *Strode v. Drug Co.*, 101 Mo. App. 627; *Locher v. Kuechenmiester*, 120 Mo. App. 719; *Deal v. Hainley*, 135 Mo. App. 513. (2) A policy of insurance is assignable as any other chose in action. *Floyd v. Prudential Ins. Co.*, 72 Mo. App. 459; *St. John v. Amer. Mut. Life Ins. Co.*, 13 N. Y. 31; *Brockway v. Mutual Ben. L. Ins. Co.*, 9 Fed. 249; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591; *A. O. U. W. v. Brown*, 112 Ga. 545; *Fitzpatrick v. Ins. Co.*, 56 Conn. 116; *Chamberlain v. Butler*, 61 Neb. 730; *Prudential Ins. Co. of America v. Liersch*, 122 Mich. 436; *Steinback v. Diepenbrock*, 158 N. Y. 24; *Strike v. Wis. Odd Fellows Mut. L. Ins. Co.*, 95 Wis. 583; *Bowen v. Natl. Life Assn.*, 63 Conn. 460; *Rittler v. Smith*, 70 Md. 261; *Bursinger v.*

Bank of Waterloo, 67 Wis. 76; Souden v. Home Friendly Soc., 72 Md. 511; Clogg v. McDaniel, 89 Md. 416; Mutual L. Ins. Co. v. Allen, 138 Mass. 24; Dixon v. Natl. L. Ins. Co., 168 Mass. 48; Murphy v. Red, 64 Miss. 614; Johnson v. Van Epps, 14 Ill. App. 201; McFarland v. Creath, 35 Mo. App. 112; Stoelker v. Thornton, 88 Ala. 421; Olmstead v. Keyes et al., 85 N. Y. 598.

REYNOLDS, P. J.—This is an action on a policy of insurance upon the life of one William Brophy, the principal, \$500, payable, unless otherwise paid under conditions in the policy, unto the executors, administrators or assigns of William Brophy. The conditions referred to are in what is called the “facility clause.” It is a policy issued by what is called industrial insurance companies and contains the “facility of payment” clause referred to above, which is to the effect that the company may make any payment provided for in the policy, to any relative by blood or connection by marriage of the insured, or to any other person appearing to the company to be equitably entitled to the same by reason of having incurred expenses in any way on behalf of the insured for his or her burial or for any other purposes, and the introduction by the company of a receipt signed by any or either of said persons or of other sufficient proof of such payment to any or either of them to be conclusive evidence that such benefits have been paid to the person or persons entitled thereto and that all claims under the policy have been fully satisfied. This “facility clause” is the second article of the conditions, and the policy in suit is No. 15,550,408. The suit in the case was brought by the administrator of Mary F. Kelly, deceased, and it is stated in the petition that after the issue of the policy to Brophy, he had paid the premiums as they fell due and that it was in force when he died October 12, 1908; that “during the lifetime of said William Brophy and for value received, he assigned, transferred and delivered said policy to Mary F. Kelly, of

the city of St. Louis, Mo., and that Mary F. Kelly, after said assignment, continued to be the owner and holder of said policy until her death, which occurred on or about the 3d of November, 1908;" that on the 13th of October, 1908, a day after the death of Brophy, the defendant, knowing that the policy had been assigned to Mrs Kelly and recognizing its liability to her upon the policy, obtained it from her for the purpose of preparing proofs of the death of Brophy and promised to make out the proofs of death and then pay her the amount called for by the policy; that on this promise of the defendant, she delivered the policy to it and thereafter on the 3d of November, 1908, died, then being the owner of the policy and entitled to the money called for by it; that the defendant never paid the money to Mrs. Kelly during her lifetime; that on her death plaintiff was appointed her administrator and had qualified as such and had demanded the \$500 from defendant which defendant had refused to pay; that plaintiff cannot file the policy by reason of having delivered it to the defendant, who has declined to surrender it or to give him a copy of it, and judgment is demanded for the \$500 and interest.

The answer, after a general denial, sets up the issue of the policy and its terms as before stated; that is to say, that it was payable "to the executors, administrators or assigns of the person named as the insured in the said policy." That Brophy died on the 12th of October at St. Louis; that on the 20th of November, the public administrator, Harry Troll, took charge of the estate of Brophy, under an order of the probate court of the city, and as administrator made a demand upon the defendant company for the proceeds of the policy which the company paid to said Troll. For another defense, it is averred that Mary F. Kelly, plaintiff's intestate, had no insurable interest in the life of William Brophy by relationship or otherwise and that if any assignment of the policy was made by Brophy to Mary F. Kelly, it

was null and void, illegal and contrary to public policy, and Mary F. Kelly and plaintiff, her administrator, have no interest or right in the proceeds of the policy. The reply was a general denial. Trial was had before a court and jury. The following paper was produced which was claimed to be the assignment from Brophy to Mrs. Kelly:

"To The Prudential Insurance Company of America.  
"Home Office, Newark, N. J.

"September 18, 1901.

"I, the undersigned, the person making application for, and insured under Policy No. 15,550,408 in the above named company, hereby request and authorize the said company, in event of my death prior to the death of the person next hereinafter named, to pay the benefit specified in said policy to Mary Kelly, my (state relationship, if any) friend, and the receipt signed by said person, or other sufficient proof of such payment, shall operate in the same manner as the receipt or proof of payment described in said policy.

"It is mutually agreed and understood, however, that nothing herein is to vary in any manner any of the provisions, agreements or conditions contained in said policy and the application therefor, especially the first proviso in case the policy is numbered between No. 59,691 and No. 816,845, inclusive, or article second in case the policy is numbered higher than No. 816,845; and that said company may, at its option, pay said benefit according to the said proviso, or article second, anything herein to the contrary notwithstanding.

His

"(Signature), William X Brophy.

Mark

"Witness, S. W. Pollard.

"Some person beside Agent must sign as witness if subscriber make a mark.

"This form should not be sent to the home office, but retained by the holder of the policy, and presented with the policy when claim is made."

Beyond this paper no proof of assignment was introduced and the only testimony about the assignment being "for value" was the testimony of a witness to the effect that she had heard a conversation between Brophy and Mrs. Kelly in which the former had said that Mrs. Kelly should get this money, this \$500, and that that would pay her what he owed her. This testimony was objected to when offered, on the ground that the conversation between Mrs. Kelly and Mr. Brophy was not binding upon the defendant and that it was a conversation which occurred after the assignment had been made. There is no evidence in the case tending to show that the policy or receipt books had been obtained by the defendant from Mrs. Kelly, beyond the recital of that as a fact in a letter which the attorneys for plaintiff wrote to the defendant. It was in evidence that the defendant had paid the money to Mr. Troll, as public administrator in charge of the estate of Brophy, and it is also in evidence that Mr. Troll had paid the funeral expenses of Brophy. The evidence also tends to show that he did not pay these funeral expenses until after he had received the \$500 from the defendant. How much he paid on that account is not apparent, nor is there any testimony in the case as to any indebtedness from Brophy to Mrs. Kelly at the time of his death or as to its amount, beyond that before recited.

Having reference to the "facility clause" of the policy, we think that the defendant is protected by that in making the payment to the public administrator as the administrator of the estate of Brophy. It is difficult to construe the paper claimed to be an assignment into an assignment for value as alleged in the petition. It provides that "in the event of my (Brophy's) death prior to the death of the person next hereinafter named, to pay the benefit specified in said policy to Mary Kelly,



my friend, and the receipt signed by said person, or other sufficient proof of such payment, shall operate in the same manner as the receipt or proof of payment described in said policy." This is not an absolute assignment or even a definite change of beneficiary. No provision is made by it as to what is to happen if the insured survives Mrs. Kelly. On its face it is made subject to the terms and conditions of the facility of payment clause, in that it is distinctly set out that it is made subject to article second, which is the "facility clause," and as the number of the policy is higher than No. 816,845, that clause is applicable to it, and that the "company may, at its option, pay said benefit according to said proviso, or article second, anything herein to the contrary notwithstanding." So that whatever interest Mrs. Kelly took in the contract was subject to the right of the defendant to pay it to any person appearing to it to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his burial or for any other purpose. The public administrator paid the funeral expenses of the insured; whether he did so before or after the receipt of the money is immaterial. Evidently he had incurred them and made himself liable for them. No one else pretends to have incurred or paid them. Evidently neither plaintiff nor his intestate did so. Mrs. Kelly held this certificate subject to the right of the defendant to pay the fund to whomsoever it was satisfied had paid them. The evidence that Mrs. Kelly took this policy as a creditor is too slight to be even persuasive, much less controlling. The paper itself is significantly silent on this; it does not intimate that she is a creditor; it does not by implication assign the policy for value. At most it is a change of designation of beneficiary, the beneficiary taking subject to the right of the defendant to pay it to any person appearing to it to be equitably entitled thereto by reason of "having

incurred"—not paid, expenses in any way on behalf of the insured for his burial "or for any other purpose."

The proposition contended for by counsel for respondent that a party cannot assign an insurance policy to one who is not a relative is untenable. It has been decided that he may assign to any one standing in the position of creditor or dependent; that is, to one who has an insurable interest in his life. The difference between the act of a party taking out insurance on his own life for the benefit of another and the act of the party insured, after he has taken out the policy, assigning it to another, is marked in the law of this State and of the United States. [Warnock v. Davis, 104 U. S. 775.] The verdict and judgment are reversed. All concur.

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**SAMUEL S. RENFRO, by SAMUEL A. JENKINS, His  
Next Friend, Appellant, v. METROPOLITAN  
LIFE INSURANCE COMPANY, Respondent.**

St. Louis Court of Appeals. Submitted on Briefs March 14, 1910.  
Opinion Filed April 19, 1910.

1. **LIFE INSURANCE: Industrial Policy: Facility Clause: Validity.** The facility clause of an industrial life policy, providing that on the death of insured prior to a specified date the amount due may be paid to either the beneficiary named or to the executor or administrator, husband or wife or any blood relative of insured, and that the production of a receipt signed by either of them shall be conclusive evidence of payment, is valid; and where insurer has paid the amount of the policy to one of the enumerated persons who owned the policy and surrendered it, another of the persons enumerated can not compel payment.
2. **APPELLATE PRACTICE: Credibility of Witnesses: Review.** The credibility of witnesses is for the trial court.
3. **CONTRACTS: Not to be Varied by Parol Evidence: Evidence.** A written contract can not be varied by parol evidence of the intent of the parties before executing it.
4. **LIFE INSURANCE: Industrial Policy: Ambiguity in Designating Beneficiary: Parol Evidence Competent to Explain: Evi-**

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dence. The word "estate" in an industrial life policy naming the "estate" of insured as the beneficiary and providing for the payment on the death of insured before a designated date of the amount due to either the beneficiary or the executor or administrator, husband or wife, or any relative by blood of insured, is ambiguous, and parol evidence that the agent of insurer at the time he procured the application for the policy informed insured that her only child would be paid the policy is admissible to show the child's rights, and the child, in possession of the policy at the time of insured's death, can compel payment thereon.

5. ———: ———: Construction. Industrial life policies will be treated by the courts as highly benevolent, and they will not be construed as intending to provide a fund for the benefit of creditors of insured, unless that is distinctly set out in the policy itself.
6. ———: ———: Vexatious Refusal of Payment by Insurer. Where insurer in an industrial policy designating the estate of insured as the beneficiary refused to pay on insured's death the amount of the policy to the only child of insured, the court awarding judgment in favor of the child should not impose the damages prescribed by section 8012, Revised Statutes 1899, for insurer had the right to take the judgment of the court as to its liability, that question never having been directly before an appellate court of this State.
7. INFANTS: Suit by Next Friend: Attainment of Majority. Where the real party in interest has, pending the litigation, attained full age, the next friend may in the discretion of the court be dismissed from the case, and judgment entered directly in favor of such party.

Appeal from St. Louis City Circuit Court.—*Hon. Jas. B. Withrow*, Judge.

REVERSED AND REMANDED (*with directions*).

*James J. O'Donohoe* for appellant.

(1) Since the plaintiff was the son of insured and in possession of the policy and premium receipt book, the judgment should have been for him and not for defendant. *Wilkinson v. Metropolitan Life Ins. Co.*, 63 Mo. App. 404; *Wilkinson v. Metropolitan Life Ins. Co.*, 64 Mo. App. 172; *Floyd v. Prudential Ins. Co.*, 72 Mo. App. 455; *Thomas v. Prudential Ins. Co.*, 158 Ind. 463;

McCarthy v. Metropolitan Life Ins. Co., 162 Mass. 254; Prudential Ins. Co. v. Young, 43 N. E. 253; Western and Southern Life Ins. Co. v. Galvin, 68 S. W. 655 (24 Ky. Law Rep. 444). The uncontradicted evidence shows that at the time the application was made for the policy defendant's agent orally represented that the policy would be paid the plaintiff, in case of the death of the insured, and this constitutes a binding election and deprives the defendant of any option under the policy. Shea v. United States Industrial Ins. Co., 23 App. Div. 53 (48 N. Y. Sup. 548). And the representation and election is binding on defendant. Schmidt v. Ins. Co., 2 Mo. App. 339; Hanley v. Ins. Co., 4 Mo. App. 253; Jackson v. Ins. Co., 27 Mo. App. 62; Burnham v. Ins. Co., 63 Mo. App. 85; Ormsby v. Ins. Co., 98 Mo. App. 371; Brennen v. Ins. Co., 99 Mo. App. 718; Wagaman v. Ins. Co., 110 Mo. App. 616; Gorton v. Ins. Co., 115 Mo. App. 69; Crowder v. Ins. Co., 115 Mo. App. 535; James v. Ins. Co., 148 Mo. 1; Andrus v. Ins. Co., 168 Mo. 151. (2) "Estate" is an ambiguous designation, but is usually construed to mean the wife or minor children of the insured. Bacon on Benefit Soc. and Life Ins. (2 Ed.), sec. 263; cases cited. Among others, the following: Clinton v. Hope Ins. Co., 45 N. Y. 461; Pace v. Pace, 19 Fla. 438; Meyers v. John Hancock Ins. Co., 41 Mo. 538; Globe Ins. Co. v. Boyle, 21 Ohio St. 119; Dale v. Brumley, 96 Ind. 674; Huston v. Jenson, 110 Wis. 26; Daniels v. Pratt, 143 Mass. 216; Beckman v. Imperial Council, etc., 11 N. Y. Sup. 321; Basye v. Adams, 81 Ky. 368. (3) The defendant's refusal to pay the policy to plaintiff is vexatious, and he should be allowed, in addition to the face of the policy and interest, a sum of damages, not exceeding 10 per cent of the loss, and a reasonable attorney's fee. Section 8012, R. S. 1899; Kellog v. Ins. Co., 133 Mo. App. 391; Utz v. Ins. Co., 122 S. W. 318; Williams v. Ins. Co., 189 Mo. 70; Keller v. Ins. Co., 198 Mo. 440.

*Nathan Frank and M. W. Oliver for respondent.*

(1) Where a policy of life insurance contains a named beneficiary, the fact that it also has a condition permitting the insurer to make payment to any person or persons within certain designated classes, does not obligate the insurer to pay the policy to any one other than the named beneficiary. *Lewis v. Metropolitan Life Ins. Co.*, 178 Mass. 52, 59 N. E. 439; *Wolkal v. Belsky*, 65 N. Y. S. 815; *Ferretti v. Prudential Ins. Co.*, 97 N. Y. S. 1007; *Golden v. Mutual Life Ins. Co.*, 59 N. Y. S. 143.

(a) The "facility clause" in the policy issued by respondent, gives no person named therein a vested interest, nor does it entitle any such person to sue; but simply confers upon the insurer an option to pay to any one falling within the classes named in such clause, the benefit provided for in the policy if it deems such person or any of them equitably entitled to the same; otherwise the policy is payable to the named beneficiary or to the executors or administrators of the insured. *Lewis v. Metropolitan Life Ins. Co.*, 178 Mass. 52; *Wolkal v. Belsky*, 65 N. Y. S. 815.

(2) All negotiations had prior to the issuance of a policy of life insurance are merged in the policy, and in the absence of fraud, the terms of such policy cannot be modified or changed by any evidence to show a prior or contemporaneous oral agreement. The acceptance of a policy affords conclusive evidence of knowledge and assent of all parties to all its contents, terms and conditions. *Huber Mfg. Co. v. Hunter*, 87 Mo. App. 50; *Ijams v. Providence Life Assn.*, 185 Mo. 466; *Gillum v. Fire Association of Philadelphia*, 106 Mo. App. 673; *Hutton v. Jenson*, 110 Wis. 26, 85 N. W. 68.

(a) The appellant was not a party to the application made for this policy. The respondent had no contract with him, nor did he pay any of the premiums. It results that he cannot be heard to object to the terms and conditions of the policy, which, if they were erroneous, through fraud or mistake, could only be corrected at the

instance of the insured, Jessie Taylor. *Nims. v. Ford*, 35 N. E. (Mass.) 100. Where the beneficiary named in a policy of life insurance is "The Estate," such policy becomes an asset of the personal estate of the insured, and is payable to his executor or administrator, and to no one else. 11 *Joyce on Insurance* (Ed. 1897), sec. 776; *Daniel v. Pratt*, 143 Mass. 210; *Meyers v. John Hancock Ins. Co.*, 41 Mo. 538.

**STATEMENT.**—Samuel S. Renfro is an infant under the age of 21 years and over the age of 18, and having no legally appointed guardian, a next friend, who is the nominal plaintiff, has been appointed by the court to serve in that capacity and as such has brought this suit. Using the word plaintiff hereafter, unless otherwise noted, we refer to the minor, who is the real party in interest. The suit was originally brought in a justice's court on a statement there filed and on an appeal to the circuit court the amended petition on which the case was tried was filed. In this amended petition it is set out that the defendant is a corporation incorporated under the laws of New York, engaged in business in this State, and that on the 14th of October, 1901, at the city of St. Louis, the defendant, by its certain policy, insured the life of one Jessie Taylor, the mother of the plaintiff, and that while the plaintiff's name does not appear in the policy as the beneficiary, yet it is averred that it was understood and agreed by and between defendant, plaintiff and the insured that the plaintiff would be made beneficiary in the policy; that it is provided in the policy as follows:

"In case of such prior death of the insured the company may pay the amount due under this policy to either the beneficiary named above or the executor or administrator, husband or wife, or any relative by blood of the insured, and the production of a receipt signed by either of them shall be conclusive evidence that all claims under this policy have been satisfied."

The petition then sets out that plaintiff is a relative by blood of the insured, being her only child and heir, and that ever since the issue of the policy he has been the owner thereof and the owner of the receipt book in which the premiums paid on the policy were recorded; that it is now and was at the time of the issue of the policy, the custom of the defendant to pay industrial insurance policies such as this to the husband or wife or any relative by blood of the insured; that the insured, Jessie Taylor, died about the 25th of April, 1907, and at the time of her death all the conditions and provisions contained in the policy were duly complied with by her and within a short time after her death plaintiff applied to defendant for blanks upon which to make proof of the death of the insured, but the defendant failed, neglected and refused to furnish them and denied all liability on the policy, thereby waiving such proofs of death; that prior to the institution of the suit plaintiff demanded of defendant payment of the policy "but defendant vexatiously refused to pay said policy or any part thereof." Judgment is prayed for \$195, less the unpaid premiums of 15 cents per week from the 14th day of May, 1906, to the date of the death of the insured, namely, 25th of April, 1907, with interest thereon from the filing of the suit, to-wit, 26th of August, 1907, also 10 per cent of the face of the policy, less the unpaid premiums aforesaid, and a reasonable attorney's fee for vexatiously refusing to pay the policy. There was no written pleading on the part of the defendant, either before the justice or the circuit court.

The case was tried before the court, a jury having been waived, and the policy introduced, which was in the name of Jessie Taylor, the weekly premiums being 15 cents and the amount of insurance payable in the event of death after one year \$195, after three years the above amount to be increased as provided in the policy. Opposite the entry, "name of beneficiary and relationship to the insured," is the word "Estate." The policy then

provides in the ordinary way that in consideration of the statements in the printed and written application which are made warranties and of the payment of the premiums mentioned on or before each Monday, the Metropolitan Life Insurance Company agrees to pay as an endowment to the insured named above, on the anniversary of the policy next after she shall have passed the age of 79 years and upon the surrender of the policy and all receipt books, \$270; or if the insured die prior to the date of the maturity of the endowment, to pay upon receipt of proofs of the death of the insured, made in the manner, to the extent and upon the blanks required herein and upon surrender of the policy and all receipt books, the amount stipulated in said schedule. Then follows this clause, which is called the "facility" clause:

"In case of such prior death of the insured the company may pay the amount due under this policy to either the beneficiary named above or to the executor or administrator, husband or wife, or any relative by blood of the insured, and the production of a receipt signed by either of them shall be conclusive evidence that all claims under this policy have been satisfied."

Another clause in the policy provides that the agents of the defendant company are not authorized and have no power to make, alter or discharge contracts, waive forfeitures or receive premiums on policies more than four weeks in arrears or to receipt for the same in the receipt book.

It was admitted at the trial that the premiums had not been paid on the policy from the 14th of May, 1906, to the date of the death of the insured, 25th of April, 1907, but that the reserve on the policy carried it by way of extended insurance beyond the death of the insured which it is admitted occurred on the 25th of April, and it was also admitted that the amount due on the policy, if there is any liability on the part of the defendant to this plaintiff, is the face of the policy less the unpaid pre-



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miums of 15 cents per week, commencing on the 14th day of May, 1906, and ending on the 25th day of April, 1907, with interest at 6 per cent per annum.

Plaintiff Renfro, being sworn, testified that Jessie Taylor was his mother; that he was present when the application for the policy was written. He was asked what was said between the agent and his mother with respect to whom would be the beneficiary of the policy at that time. This was objected to as an attempt to vary a written contract by parol evidence; objection overruled, defendant duly excepting. Witness answered that the agent said he (plaintiff) should be the beneficiary in the policy and that it would be paid over to him in case of the death of his mother. He testified that he had no brothers or sisters and that his father was not now living, being dead at the time the policy was taken out. At the time his mother died he (plaintiff) had possession of the premium receipt book and the policy and had possession of them until he had turned them over to his attorney for the purposes of this suit. On cross-examination he testified that he had never had any brothers or sisters and was the only child; was present at the time when his mother and the agent of the defendant had the conversation in regard to the policy and was then 14 years old; is now 20 years old; doesn't remember the day of the month that the conversation occurred but it was before the policy was delivered to his mother.

A witness, placed upon the stand in behalf of plaintiff, testified that he had been the agent of the defendant; he was asked to look at the policy in suit and state what, under its provisions, was the custom of the defendant company as to whom similar policies were paid in the year 1901. This was objected to and objection sustained.

The attorney for plaintiff, sworn on behalf of plaintiff, testified that as attorney for plaintiff he wrote the defendant a letter, a copy of which he produced. The

letter is not in the record by reason, as counsel state, of the admissions following, namely, that is to say, that for the purposes of this case it is admitted that a demand was made on the defendant for payment under the policy, also that the request for blanks was made and refused because the defendant denied any liability in the case to plaintiff because plaintiff was not the designated beneficiary and not entitled to the payment of proceeds thereof. This was all the evidence in the case.

At the close of it plaintiff prayed the court to declare the law to be that under the pleadings, the law and the evidence plaintiff was entitled to recover. The court refused this, plaintiff duly excepting to the refusal, and at the instance of the defendant the court declared the law to be that under all the evidence in the case plaintiff is not entitled to recover against the defendant and the finding and judgment will therefore be in favor of the defendant. This was objected to by plaintiff and exception duly saved to it being given. Judgment was thereupon entered in favor of defendant, from which plaintiff of record, after filing a motion for new trial, perfected an appeal to this court.

REYNOLDS, P. J. (after stating the facts).—There have been a number of cases on like policies before this court, this class of insurance being what is commonly called "industrial life insurance." As was said by this court in the case of *Wilkinson v. Life Ins. Co.*, 63 Mo. App. 404, and referring to this same company defendant, that while the case involves a small amount, upon its decision depended the interpretation to be placed upon the most important clause in the policies issued by what are known as industrial insurance companies. In the *Wilkinson* case this court held that the clause above referred to, known as the "facility" clause, was valid; and that it did not authorize or compel the payment by the company to one of the persons enumerated, after another such person, who owned the

policy, had surrendered it to the company in order to receive the payment. This was again affirmed in a suit between the same parties, reported 64 Mo. App. 172.

It will be noticed that in the case at bar the designation of the party to whom the amount due under the policy is to be paid in the event of the death of the insured before the endowment period has matured, is "Estate." That is, no particular person is designated, the word "estate" alone being used. Over the objection of the defendant the plaintiff offered evidence, which was admitted by the court subject to the exception, to the effect that at the time when the policy was issued it was understood between his mother and the agent of the company, that he, the only child, was the person meant by "Estate." At the time when the plaintiff claims to have heard this conversation, he was but fourteen years old and was twenty when he testified. The learned counsel for defendant contend with great force that it is very improbable that a young boy of fourteen would have remembered this one fact. We are not the court to pass on that one way or the other. The credibility of the witness was for the learned trial court. Nor can we say what view he took of it. The objection made to this evidence when offered is that it was incompetent, as an attempt to vary the policy. This was the only objection made to it at the time it was offered. The learned trial judge did not finally pass on this objection, but it was not tenable. This testimony had no tendency to vary or contradict the policy but was the explanation, by extrinsic evidence, of what took place at the time of the delivery of the policy, of an ambiguous term, that is to say, the term "estate," found in the policy itself. We make no contention, of course, over the propositions that contracts are not to be varied by parol testimony as to what was intended by the parties before their execution, but that is not this case. In an old case, that of *Loos' Guard v. John Hancock Mut. Life Ins. Co.*, 41 Mo. 538, Judge WAGNER, who delivered the opinion of the court

and construing the term "to his heirs or representatives," to whom the policy there before the court was payable, says (l. c. 541), that while the term "representatives," in general and in a professional or technical sense simply means executor or administrators, they are often construed differently, "if it is clear that the intention was to vest the estate in a different class of persons. That they mean executors and administrators will ordinarily be taken as true, where nothing is shown to raise a counter presumption, but the meaning is not so inflexibly attached so as to prevail in all cases when it is manifest that another disposition was intended. The intention must control, and that intention is to be gathered by a view of the context subject-matter and the purpose to be attained. The words have therefore been held to mean next of kin when the circumstances of the case made it apparent that such a construction would effectuate the object had in view. The language used by the assured would seem to indicate that it was his intention, in case of his untimely decease, to make some provision for the surviving members of his family, and not that the money arising from the policy should go to his executors or administrators, to be administered on as ordinary assets."

1 Bacon in his works on Benefit Societies and Life Insurance (3 Ed.), sec. 263, states the law to be that if the name of the person for whose benefit the insurance is obtained does not appear upon the face of the certificate or policy or if the designations used are applicable to several persons or if the description of the insured is imperfect or ambiguous, so that it cannot be understood without explanation, extrinsic evidence may be resorted to to ascertain the meaning of the contract, and referring to the case of *Clinton v. The Hope Ins. Co.*, 45 N. Y. 454, l. c. 461, he states it as the law, that where the agent was told that the insurance was designed for the benefit of the widow and heirs and policy was made "payable to the estate," it is held that

the rule above given had direct application, as it is not essential that the person or persons insured should be named in the policy nor is that essential in the contract of insurance.

In the case of *Pace v. Pace*, 19 Fla. 438, the policy was written as "for the benefit of the estate of the insured," and it was held that under the circumstances of the case, and aided by extrinsic evidence, as in the case at bar, the terms referred to meant for the benefit of an only minor child, who was less than five years of age at the time of the contract and that it did not go to the administrator or distributees of the estate. The Florida court cites in support of its position the case of *Loos' Guard. v. John Hancock Ins. Co.*, *supra*, the case of *Clinton v. Ins. Co.*, *supra*, and also *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119, all holding that the words are to be so interpreted as to be for the benefit of the surviving members of a family rather than for the benefit of the creditor or administrator, and that in the instance before the court, the beneficiary intended was the infant child. Mr. Bacon cites a number of cases to the same effect, that is to say that the term "estate" included or designated as the beneficiary, not the administrator or executor, but a child or other one.

2 *Joyce on Insurance* (Ed. 1897), sec. 776, is to the same effect. There Mr. Joyce states that a question arises where the proceeds of a benefit certificate are payable to the "estate" of the insured, whether the fund shall be subject to the claims of creditors; and he states that in the consideration of this point, the laws of the society, where it is a benefit certificate, the whole statute, contract, the constitution, etc., the terms of the certificate, and the intentions of the parties, must be considered. In the brief of the learned counsel for the respondent in this case, 2 *Joyce on Insurance*. (Ed. 1897), sec. 776, is referred to in support of the proposition that when the term "estate" is used in these policies, such policies become an asset of the personal estate

of the insured and payable to the executor or administrator and to no one else, and in their printed argument they state, "The fundamental rule is thus laid down by 2 Joyce on Insurance (Ed. 1897), sec. 776, as follows," and counsel then put under quotation marks to this: "Where the beneficiary named in the policy of life insurance is 'the estate,' such policy becomes an asset of the estate, and is payable to the executor or administrator of the insured." A very careful reading of the section from Joyce referred to, not only fails to show any such language in it, but, as we have seen, the text of the section referred to, in the edition referred to, directly holds to the contrary. We think it obvious from this class of contracts, and they have been, as before said, many times before our courts, and on consideration of the fact that the provision is for the immediate happenings upon the death of the insured, and of the small amount provided for, that it cannot be said, with any propriety or with any proper consideration of this form of insurance, that they are intended to provide a fund for the benefit of creditors, unless that is distinctly set out in the policy itself, as has been done in several cases where a special provision, by pledge or otherwise has been made for a creditor. In general to place a policy of this small amount and apparently consisting of the whole estate left by the decedent into the hands of an appointed administrator would be to tie up the whole fund, obviously intended to meet burial and other immediate expenses attendant upon death, to pervert it from its real object and to cause it to be eaten into seriously by court expenses, and administrative and other allowances of various kinds. We consider these industrial policies highly benevolent, and that they are to be so treated. Looking into the facts in this case and considering, under the adjudications of the courts on these matters, that payment to this plaintiff absolves the defendant from any payment to any other possible claimant, we think that the judgment of the learned trial

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judge should have been for the plaintiff. We decline to impose the statutory damage of ten per cent, under section 8012, R. S. 1899, as the question involved here has never been directly before our court. Respondent had a clear right to take the judgment of the court thereon and its refusal to pay appellant was not vexatious within the meaning of the statute.

The judgment in the case is accordingly reversed and the cause remanded with directions to the trial court to enter up judgment in favor of the appellant. If the real plaintiff, the son of the insured, is now of age, as is suggested, the next friend may be dismissed from the case, in the discretion of the trial court, and judgment be entered by it directly in favor of Samuel S. Renfro for the amount due, as shown by the stipulation or agreement of counsel, with interest thereon from the date of the suit at the rate of six per cent per annum. All concur.

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HENRY OSTMANN, Appellant, v. MAX J. FREY  
et al., Respondents.

St Louis Court of Appeals, May 3, 1910.

1. **PROHIBITION: Parties: State not Necessary Party.** Under section 4450, Revised Statutes 1899, providing that proceedings for prohibition shall be by civil action in which the moving party is plaintiff and the adverse party defendant, the state is not a necessary party.
2. **APPEALS: Prohibition: Denial of Writ: Appealable Order.** Under section 4455, Revised Statutes 1899, declaring any final judgment in prohibition reviewable by appeal, an appeal lies from a final judgment on the merits, authorized by section 4454, denying the writ, although no preliminary rule was awarded.
3. **PROHIBITION: Functions of Writ.** The writ of prohibition goes only from a superior court to an inferior tribunal to the

end of preventing or staying judicial proceedings without or in excess of the jurisdiction of such inferior tribunal, and it will not lie to prevent the execution of a mere ministerial act by a ministerial officer, and as a general rule will not go against judicial officers in performing mere ministerial duties.

4. ———: **Constables Levying Execution Ministerial Act.** A constable is a ministerial officer and the act of levying an execution in his hands is ministerial, and prohibition will not lie to prevent him doing so.
5. ———: **Justices' Courts: Issuance of Execution: Judicial Act.** The issuance of an execution by a justice of the peace is a judicial and not a ministerial act, and prohibition is available to prevent him from issuing the writ if it appears he is proceeding without or in excess of his jurisdiction.
6. ———: **To Prevent Proceedings in Lower Court, After Appeal.** As a general rule, prohibition is available to prevent further proceedings in execution of the judgment of an inferior tribunal when that judgment has been superseded by a proper appeal and appeal bond.
7. ———: **Judicial Power of Inferior Tribunal Exhausted.** Prohibition will not lie against a court of inferior jurisdiction, such as a justice's court, where it appears such court was possessed of complete jurisdiction in the first instance and has exhausted its judicial power in the premises, for in such case there is nothing of a judicial character upon which the prohibition can operate.
8. **COURTS: Of General Jurisdiction: Power to Quash Writs.** A court of either general or superior jurisdiction has authority to withdraw and quash writs which have been issued as a result of a judgment theretofore given.
9. **JUSTICES' COURTS: Powers: Quashing Writs.** A justice of the peace has no power to either recall or quash an execution issued by him.
10. **PROHIBITION: Preventive Remedy.** Prohibition is a preventive, rather than a corrective, remedy, and issues only to prevent the commission of a future act and not for the purpose of undoing an act already performed.
11. ———: **Justices' Courts: Preventing Enforcement of Execution.** Where, after an appeal had been taken from a judgment rendered by a justice of the peace, he issued an execution, prohibition would not lie to correct his error, his judicial power having been exhausted by issuing the execution.

Appeal from St. Charles Circuit Court,—*Hon. Jas. D. Barnett, Judge.*



**AFFIRMED.***Wm. H. Clopton* for appellant.

(1) After the affidavit for an appeal was made and the appeal bond approved by Justice Frey, his jurisdiction over the case ceased. Ostmann had done all the law required him to do. If the learned prosecuting attorney of St. Charles county desired an affirmance of the judgment he could have presented a copy of the record below and asked for an affirmance. The statutes of the State provide no means whereby Ostmann could have obtained relief. Certiorari would not help him. *Moore v. Ruby*, 8 Mo. App. 156; *Breen v. Welz*, 4 Mo. 250; *State ex rel. v. Raum*, 3 Mo. App. 580. (2) The State has provided by positive law against the wrong complained of. By section 4448, R. S. 1899, it is provided that the remedy afforded by the writ of prohibition shall be granted to prevent the usurpation of judicial power, and in all cases where the same is now applicable according to the principles of law. The appeal ousted Justice Frey of jurisdiction over the case. Where an appeal bond is deposited with a justice of the peace in time the fact that the justice fails to perform his duty is not the fault of the applicant and will not invalidate his appeal. *Distilling Co. v. Kermis*, 79 Mo. App. 111; *Rowe v. Schultz*, 74 Mo. App. 602. (3) The delivery of his affidavit and bond to Justice Frey was a filing of those papers for all the purposes of the law. *Anderson's Dictionary of Law*, 459; *Callin v. Kamman*, 55 Mo. App. 465, and cases cited.

*Theodore C. Bruere* for respondents.

(1) The record discloses that appellant never filed an appeal bond in conformity to section 2438, R. S. of Mo. 1899. And therefore no appeal was taken. (2) The giving of the peace bond by appellant under the pro-

visions of section 2430, R. S. of Mo. 1899, estops him from maintaining this action. (3) The fee bill by lapse of time is dead, the return day having long expired, and any restraining or prohibitory order made would be without beneficial results. (4) The plaintiff had an adequate remedy at law if the justice refused to grant an appeal. His remedy was by rule and attachment from the circuit court. *Railroad v. Franks*, 55 Mo. 325; sec. 4065, R. S. 1899. (5) Prohibition will not lie against a ministerial officer or constable. (6) Prohibition will not lie to restrain a ministerial act such as issuing an execution. *State ex rel. v. Clark Co.*, 41 Mo. 50; *Casby v. Thompson*, 42 Mo. 133; *Hockaday v. Newsom*, 48 Mo. 196. (7) If the judgment of the justice is void as contended for by appellant, then appellant is not entitled to resort to equity to enjoin the execution of a void judgment. *Strauss v. Simpson*, 74 Mo. App. 230; *Railroad v. Lowder*, 138 Mo. 533. (8) Appellant never has perfected an appeal from the judgment of the justice and is not entitled to equitable relief.

NORTONI, J.—This is an application for a prohibition which originated in the circuit court. Upon filing the petition, summons was duly issued and served on defendants who appeared in due time and filed their answer. The issues having been thus made up, after hearing the evidence on behalf of both parties, the court denied the writ, dismissed the petition and entered judgment accordingly. From this judgment the plaintiff prosecutes the appeal. The rule formerly obtained in this State as at common law, to the effect that though an appeal was a proper remedy on behalf of the respondent when the circuit court had awarded a prohibition, none was allowable at the suit of the relator when the writ was denied. In cases where the mover had applied to the circuit court for a writ of prohibition and his application in that behalf had been denied, it was ruled

that no appeal would lie on the part of the relator for the reason such refusal was not a final judgment operating to estop him from applying to a superior court for an original writ as though no application had been theretofore made. The reasoning in support of that doctrine is that the writ of prohibition is unlike the writ of *habeas corpus* and not to go as a matter of right but instead is discretionary with the court to whom the application is made. It was held at an early date by the court of King's Bench that a writ of error would not lie upon the refusal of a prohibition, it not being regarded as a final judgment between the parties. [Bishop of St. David v. Lucy, *Ld. Raym*, 539.]

The doctrine of this case has been extended in many of the American courts with respect to the statutory remedy of appeal. Among the jurisdictions which adhered thereto was that of Missouri, and it has heretofore been decided on the grounds stated by both this court and the Kansas City Court of Appeals that, notwithstanding our general statute allowing appeals to the party aggrieved, no appeal would lie from an order of the circuit court refusing to award a prohibition. See *State ex rel. Griffith v. Bowerman*, 40 Mo. App. 576; *State ex rel. Smith v. Levens*, 32 Mo. App. 520; see also *High, Extraordinary Remedies*, sec. 794; 16 *Ency. Pl. and Pr.* 1143, 1144. But this doctrine no longer obtains with us as appears from a recent statute on the subject.

In 1895, the Legislature contributed an article consisting of nine sections of statutory law touching the matter of prohibition. The sections 4448, 4449, 4450, 4451, 4452, 4453, 4454, 4455, R. S. 1899. 4448, 4449, 4450, 4451, 4452, 4453, 4454, 4455, 4456, Ann. St. 1906. Section 4450 provides that proceedings for prohibition shall be by civil action in which the moving party is plaintiff and the adverse party defendant and shall otherwise conform as nearly as practicable to the code of civil practice, except as otherwise provided in the article. This statute dispenses with the idea that

the state is a necessary party to such proceedings. [State ex rel. v. Hirzel, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961.]

Section 4451, after authorizing applications for this writ to be made by petition to the proper court, says that the petition may be heard in the first instance summarily or on notice to the adverse party, as the court may order.

Section 4452 provides the defendant may demur to the petition or make return to the preliminary order. When the return is made, the plaintiff may plead thereto.

Section 4453, in so far as applicable to proceedings in the circuit court, says the cause shall be heard as soon as practicable after the issues are joined and shall be triable in the same manner as other civil cases.

Section 4454 relates to the judgment the court is authorized to give in such proceedings. Among other things, it provides upon a hearing the court may render final judgment on the merits and for the costs as the facts may warrant and that such judgment is enforceable in like manner as other judgments in civil actions.

Section 4455 relates to motions for a new trial and in arrest of judgment and authorizes an appeal from the judgment contemplated in section 4454. Section 4455 is as follows:

"Any final judgment in prohibition shall be reviewable by motions for new trial and in arrest, and by appeal, as in other civil actions; but in the case of an appeal from the judgment of any circuit or common pleas court imposing a prohibition, the appeal shall not operate to discontinue or in anywise affect the force of the judgment as a stay of the proceedings in question, until such appeal be determined."

It appears the present proceeding was instituted under these statutes. Plaintiff filed his petition for a prohibition in the circuit court in term time and the court, upon inspecting the same, entered its order of rec-

ord directing a summons to be issued and served in due form upon the defendants. This summons was returnable to a subsequent term of the court, to which plaintiff's application for a prohibition was continued. No preliminary order in prohibition was issued. The summons having been duly served, defendants appeared and answered the petition by a general denial. By this pleading, an issue was made as to the truth of the facts relied upon in the petition for the prohibition. On the issue of fact thus made, as to whether or not a prohibition should be awarded, the court heard the witnesses pro and con at great length. Indeed, the issue was framed and tried as in an ordinary suit at law and exceptions were duly saved throughout. After hearing all the evidence for both parties, the court denied the writ and dismissed the plaintiff's petition as though the facts were found for defendants. Motions for new trial and in arrest of judgment were duly saved and are preserved in the bill of exceptions together with an exception to the action of the court in overruling the same. A judgment, denying the writ, dismissing the bill, taxing the costs against the plaintiff and ordering execution therefor was duly entered and appears in the transcript here.

In this state of the record there can be no doubt that an appeal may be prosecuted under the statute above quoted, section 4455, from the judgment even though no preliminary rule in prohibition was ever awarded. Whatever may have been the rule as to this matter, prior to the statutes above referred to, those statutes certainly contemplated a final judgment between the parties in a proceeding of this character and authorize an appeal therefrom. Indeed, where the issue is made up and tried in the circuit court, as was done in this case, section 4454, in express terms, authorizes the court to "render final judgment on the merits and for the costs as the facts may warrant . . . and such judgments may further be enforced in like manner as other judgments in civil actions."

It is clear that this judgment is a final judgment in prohibition, reviewable by appeal within the meaning of section 4455. We believe the Kansas City Court of Appeals entertains the same view on the subject as it has recently entertained an appeal by the mover in a case where the circuit court, by its judgment, denied the writ on final hearing. It is true this feature of the question was not discussed in that case but everything said in the opinion indicates that court entertained no doubt whatever as to the right of the plaintiff to prosecute an appeal under the statutes from a judgment of the trial court denying the prohibition, notwithstanding such is a discretionary writ. [Graham v. Conway, 82 Mo. App. 647.]

A prohibition is sought against the defendant Frey, a justice of the peace, and the defendant Meyer, a constable. It appears the plaintiff had been convicted under sections 2429 and 2430, Revised Statutes 1899 in the court of Frey, the justice of the peace, on a charge of having threatened to do bodily harm to one Schafer and required to give a peace bond as contemplated by those statutes. Afterwards, Frey, the justice, issued an execution for costs against the defendant in that action, the plaintiff here, and delivered the same to defendant Meyer, the constable. Meyer proceeded to levy upon property belonging to the present plaintiff, who was defendant in the execution, to the end of satisfying the cost bill, whereupon the defendant in the execution instituted this proceeding for a prohibition against both officers on the theory that he had perfected an appeal from the judgment against him in the justice of the peace court and the subsequent issue and levy of the execution were therefore unauthorized.

It is argued first the writ of prohibition will not go against a justice of the peace to prevent the issuance of an execution for the reason that such is a ministerial act. There can be no doubt the writ of prohibition goes only from a superior court to an inferior tribunal to the

end of preventing or staying judicial proceedings without or in excess of the jurisdiction of such inferior tribunal. [High, Ex. Rem. (3 Ed.), secs. 762, 763; 23 Am. and Eng. Ency. Law (2 Ed.), 197, 198, 199, 200; State ex rel. v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; State ex rel. Rogers v. Rombauer, 105 Mo. 103, 16 S. W. 695; State ex rel. v. Hirzel, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961.]

It is therefore clear, as has been many times decided, that a prohibition will not lie to prevent the execution of a mere ministerial act by a ministerial officer and as a general rule the writ will not go against judicial officers in performing mere ministerial duties. [State ex rel. v. Clark Co., 41 Mo. 44; Casby v. Thompson, 42 Mo. 133; Vitt v. Owens, 42 Mo. 512; Hockaday v. Newsom, 48 Mo. 196; School District v. Burris, 84 Mo. App. 654; 23 Am. and Eng. Ency. Law (2 Ed.), 206; High, Ex. Rem. (3 Ed.), sec. 782.] As a general rule a writ of prohibition is not available to the end of preventing the issuance of an execution, such being regarded as a ministerial act only. It seems this doctrine generally obtains, although it is not the law in this State, as we understand it. [23 Am. and Eng. Ency. Law (2 Ed.), 224; High, Ex. Rem. (3 Ed.), sec. 782; Atkins v. Siddons, 66 Ala. 453; Ex parte Braudlacht, 2 Hill (N. Y.) 367, 38 Am. Dec. 593.]

The defendant constable, of course, is a ministerial officer and no one can doubt that the act of levying the execution in his hands is purely ministerial in character; therefore, if the rule obtained with us, as above indicated as to the act of the justice in issuing an execution being ministerial, such would be conclusive of the whole proceeding. On any view, there are no grounds for prohibition against the constable Meyer.

But, as to the act of the justice of the peace in issuing the execution, we are concluded by a judgment of the Supreme Court squarely in point. In Wertheimer v. Howard, 30 Mo. 420, the question was made as to

the character of the act of a justice of the peace in issuing an execution under our statutes, and the Supreme Court decided that in so doing the justice acted in a judicial capacity and not ministerially. This being true the writ of prohibition is of course available to prevent the justice from issuing the writ if it appears from any cause that he is proceeding without or in excess of his jurisdiction in the premises. There can be no doubt that the justice of the peace had full and complete jurisdiction of the cause against Ostmann in the proceeding in which he was required to give the peace bond. But plaintiff insists that he perfected an appeal from that judgment in the circuit court immediately and that such appeal operates as a supersedeas of the judgment of the justice against him for costs. For these reasons, it is said the justice was wholly without jurisdiction to issue the execution as his power in the premises had been completely divested by virtue of the appeal to the circuit court. It is clear the writ of prohibition is, as a general rule, available to prevent further proceedings in execution of the judgment of an inferior tribunal after that judgment has been superseded by a proper appeal and a bond given to that effect. Such is a familiar instance of excess of jurisdiction restrained by prohibition.

The proceedings against which the rule in prohibition goes in such circumstances are usually pending in inferior courts possessed of general jurisdiction or of plenary powers in the premises. In other words, the prohibition is awarded in such circumstances against courts which have some inherent power to the end of recalling or quashing process issued on their judgments. [State ex rel. v. Hirzel, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; State ex rel. v. Lewis, 76 Mo. 370; 23 Am. and Eng. Ency. Law (2 Ed.), 220; High, Ex. Leg. Rem. 789.] The doctrine with respect to such courts is that where any act is being put forward in execution of the judgment and is not fully completed,



the writ of prohibition is available to prevent such unwarranted exercise of power. Where anything remains to be done towards carrying the judgment into effect and there is judicial power lodged in the inferior court to further act in the premises, it is competent to award a prohibition if it appear the proceeding has been superseded by appeal or otherwise exceeds the authority of the court. In other words, even though a judgment has been rendered, prohibition will lie to prevent its execution if there remains, after such judgment, a vestige of judicial power upon which the prohibition may operate. That is to say, if the court against which the prohibition is directed is possessed of the power to recall its order or quash its writ issued on the judgment, then a prohibition may go in a proper case to the end of preventing further proceedings thereon. [State ex rel. Rogers v. Rombauer, 105 Mo. 103, 16 S. W. 695; State ex rel. Ellis v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; 23 Am. and Eng. Ency. Law (2 Ed.), 204, 205; High, Ex. Leg. Rem. (3 Ed.), sec. 766.]

But this doctrine is without influence if the prohibition is directed against a court of inferior and limited jurisdiction such as that of a justice of the peace when it appears such court was possessed of complete jurisdiction in the first instance and has exhausted its judicial power in the premises, for in such circumstances, there is nothing of a judicial character upon which the prohibition may operate. The court of a justice of the peace is not only an inferior tribunal but its jurisdiction is limited within the precise terms of the statute and in this respect it is dissimilar to a court of general or superior jurisdiction which is possessed of certain inherent powers. Among the inherent powers of a court of either general or superior jurisdiction are those which afford it competent authority to withdraw and quash writs which have been issued as a result of its judgment theretofore given. So it is, judicial power continues to reside in such courts over outstanding writs and

orders to the end of recalling and quashing them if necessary. It is upon this power the writ of prohibition operates when awarded against those courts by a superior tribunal to the end of preventing the further execution of a judgment theretofore given. The case of *State ex rel. Rogers v. Rombauer*, 105 Mo. 103, 16 S. W. 695, portrays a striking illustration of the doctrine referred to.

While this doctrine obtains with respect to the courts above mentioned, it is entirely clear that it has no application to a court of inferior and limited jurisdiction which has totally exhausted its judicial power in the premises before the prohibition is awarded. This is true for the reason that if such inferior tribunal is possessed of no further power to proceed judicially, then there is nothing judicial upon which the writ of prohibition may operate. The court of the justice of the peace, as before stated, is a tribunal of limited jurisdiction and can exercise such powers only as are conferred upon it by the statute. We have been unable to discover any statutory provision authorizing the justice of the peace court to recall or quash an execution once issued on its judgment. That such court may not either recall or quash an execution issued by it has been expressly decided. Indeed, upon issuing the writ, the power of the justice is entirely exhausted except for the purpose of thereafter renewing it under the statute. [*Brownfield v. Thompson*, 96 Mo. App. 340.] It appears in this case the justice of the peace exhausted his judicial power in the matter when he performed the function of issuing the execution and delivering it to the constable for service. After coming into the hands of the constable, the writ was levied on personal property and an execution sale advertised thereunder. In these circumstances, the writ of prohibition is not available against the justice of the peace for the reason there no longer remained judicial power in him over the writ in question. It is clear that if the justice of the peace is wholly

without authority to withdraw or quash the writ, then none can be conferred upon him by this or any other court in awarding its prohibition. In other words, though as said in *State ex rel. v. Rombauer*, *supra*, a superior court may so mold and formulate its judgment in prohibition as to require an inferior tribunal possessing sufficient judicial power to that end to recall and quash its execution, it cannot require as much with respect to an inferior tribunal which possesses no such power in the first instance. Though a prohibition may lie to prevent the justice from issuing the execution, as this is said to be a judicial act on his part, it will not go beyond this unless it appears the justice was vested with judicial power over the writ to recall or quash it and it appears he has no such power.

It is the rule that prohibition is a preventive rather than a corrective remedy and issues only to prevent the commission of a future act instead of for the purpose of undoing an act already performed. [*State ex rel. v. Ryan*, 180 Mo. 32, 79 S. W. 429; *State ex rel. v. Burckhardt*, 87 Mo. 533, 539; *High, Ex. Leg. Rem.* (3 Ed.), sec. 766.]

It appearing the judicial power of the justice was exhausted by issuing the execution prior to this application for a prohibition against it and that he retains none over the subject-matter, a prohibition is not available merely to correct his error. So much of the judicial power of the justice as was competent to invoke the operation of a prohibition was exhausted and the act performed prior to this application. It was therefore properly denied. The judgment should be affirmed. It is so ordered. All concur.

**HENRY OSTMANN, Appellant, v. MAX J. FREY et al., Respondents.**

St. Louis Court of Appeals, May 3, 1910.

1. **INJUNCTIONS: Staying Proceedings: Operates on Parties and not on Court.** An injunction granted to stay proceedings in a court of law does not operate as a restraint on such court in the exercise of its jurisdiction, but operates upon the parties to the action or ministerial officers of the court.
2. **———: ———: Judge Will not be Restrained.** An injunction will not be awarded to restrain a judge in the exercise of judicial functions.
3. **JUSTICES' COURTS: Restraining Execution: Injunctions.** An injunction will not lie to restrain a justice of the peace issuing an execution, his act in doing so being judicial.
4. **INJUNCTIONS: Staying Proceedings: Adequate Remedy at Law.** An injunction to restrain a sale under an execution issuing from a court or on a judgment given without jurisdiction will not be awarded, for the reason an adequate remedy at law exists, which may afford complete relief.
5. **———: ———: ———: Replevin.** An injunction will not lie to restrain further proceedings by a constable on an execution levied by him, though the execution was issued after the judgment was suspended by a perfected appeal and the levy was under such circumstances that the constable would not be liable for damages; there being an adequate remedy at law, by replevin, for the property.

Appeal from St. Charles Circuit Court.—*Hon. Jas. D. Barnett, Judge.*

**AFFIRMED.**

*Wm. H. Clopton* for appellant.

*Theodore C. Bruere* for respondents.

**NORTONI, J.**—This is a suit in equity. Plaintiff sought an injunction in the circuit court against defendant Frey, a justice of the peace, and defendant Meyer,

his constable. After issue joined and full proof, the court denied the writ. Plaintiff prosecutes the appeal.

The justice, Frey, issued an execution against the present plaintiff for costs incident to a judgment of conviction against him in the justice court in which plaintiff was required to give a peace bond. The defendant constable levied this execution on certain personal property of plaintiff and advertised the same for sale to satisfy the cost bill in that case. The object and purpose of the injunction prayed for is to restrain further proceedings under this execution.

It appears plaintiff had been convicted in the court of Frey, a justice of the peace, on a charge of having threatened great bodily harm against one Schafer and was required to give a bond conditional to keep the peace towards Schafer and all the people of the state. After the jury had returned a verdict in that proceeding, plaintiff avers he informed the justice of his desire to appeal from the judgment and performed all of the conditions on his part toward perfecting an appeal to the circuit court. The petition recites that plaintiff executed and delivered the necessary affidavit and proper recognizance for appeal to the justice immediately after the trial and on the same day of his conviction; that the justice approved the same but failed to enter the filing of the papers in his docket and omitted as well to enter an order in his docket granting the appeal. And, notwithstanding such appeal was duly perfected by plaintiff, defendant Frey issued an execution for the costs accrued in such case and defendant Meyer, the constable, has levied the same on his personal property and advertised it for sale. It is averred that by virtue of such appeal the justice of the peace lost jurisdiction in the premises and the same vested in the circuit court.

The theory of the case presented by plaintiff is that the judgment of the justice of the peace on which the execution for costs was issued against him was superseded and vacated by his filing the necessary affidavit and

bond for appeal therefrom to the circuit court. In other words, it is urged that although the judgment originally rendered against him in the justice court was valid, it was rendered ineffective by virtue of his appeal so that it now stands as a judgment void at law without force as authority for the issue and consequent levy of the execution.

The propriety of this proceeding against the justice of the peace may be disposed of in a few words under the authority of our Supreme Court, for whatever the rule as to such matters may be elsewhere, it has been pointedly decided by the superior court of this State that a justice of the peace acts judicially in issuing an execution. That case declares that under our statutes the act of the justice in issuing an execution is not ministerial but, on the contrary, is judicial in character. [Wertheimer v. Howard, 30 Mo. 420.] This decision is conclusive on the courts of appeals as to the matter involved in the judgment there given. As a result of that doctrine, no injunction will lie against the justice to the end of restraining him from issuing the writ of execution. It is the universal rule that when an injunction is granted to stay proceedings in a court of law, it does not operate as a restraint on such court in the exercise of its jurisdiction. In such cases, the writ operates upon the parties to the action or ministerial officers and not upon the court itself. The authorities all go to the effect that an injunction will not be awarded to restrain a judge in the exercise of judicial functions. [16 Am. and Eng. Ency. Law (2 Ed.), 365; High on Injunctions (4 Ed.), secs. 45, 46.] The only matter relied upon for relief as against the defendant Frey is that he as justice of the peace issued the execution which the constable thereafter levied. The act of issuing the execution being judicial in character under the authority of the case above cited, the right of injunction is not available to restrain it, and on any the-

ory the proceeding should fail in so far as the defendant justice of the peace is concerned.

We believe, too, the rule of decision which universally obtains, except where modified by statute, as to denying injunctions when an adequate remedy at law exists, precludes any right of relief in this proceeding against the defendant constable. There is nothing in the bill tending to show the constable knew an appeal had been perfected and it appearing the judgment against plaintiff on which the execution issued was one given within the jurisdiction of the justice, the writ of execution in the hands of the constable was valid on its face and conclusive in an action sounding in trespass against him for the levy. In these circumstances, it may be conceded that no adequate remedy at law for damages sufficient to defeat the right of injunction exists against the constable, but an adequate remedy in the form of replevin exists. [Howard v. Clark, 43 Mo. 344; Melcher v. Scruggs, 72 Mo. 406; St. Louis, etc., R. Co. v. Lowder, 59 Mo. App. 3; St. Louis, etc., R. Co. v. Lowder, 138 Mo. 533, 39 S. W. 799.] In this connection, it may not be out of place to remark that our statute, section 3649, Revised Statutes 1899, Ann. St. 1906, section 3649, seems to contemplate the remedy by injunction shall exist to prevent the doing of any legal wrong whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages. Be this as it may, notwithstanding the statute, our Supreme Court adheres to the rule that an injunction should be denied if it appear an adequate remedy at law exists against the constable in replevin. See St. Louis, etc., R. Co. v. Lowder, 138 Mo. 533, 39 S. W. 799. The rule announced in that case, which was an injunction suit to restrain the constable from selling property under execution issued by the justice of the peace on a judgment given without service of summons, is to the effect that as such judgment is void an injunction to restrain the execution should be denied for the reason the defendant in the

execution could recover the property in replevin. It was said an action for damages would not lie against the constable because it appeared the judgment on which it was issued was one within the jurisdiction of the justice and the writ of execution was regular on its face. But as no title would pass to the purchaser at the execution sale, for the reason the judgment was void as being without notice, an adequate remedy at law in replevin sufficient to defeat the right of injunction existed. There can be no doubt of the general rule that equity will decline to award an injunction to restrain a sale under execution issuing from a court or on a judgment given without jurisdiction for the reason in such circumstances an adequate remedy at law exists which may afford complete relief to the plaintiff. [16 Am. and Eng. Ency. Law (2 Ed.), 666; High on Injunctions (4 Ed.), secs. 89, 125; St. Louis, etc., R. Co. v. Lowder, 138 Mo. 533, 39 S. W. 799; St. Louis, etc., R. Co. v. Reynolds, 89 Mo. 146, 1 S. W. 208; Straub v. Simpson, 74 Mo. App. 230.]

Under the rule announced by our Supreme Court in the cases cited, it is entirely clear that if the judgment in the present case were superseded by appeal to the circuit court and thereby rendered ineffective for the purposes of an execution, as alleged by plaintiff, then the execution issued thereon, although regular on its face, was void and of no force, and the constable's sale thereunder would convey no title. In such circumstances, an adequate remedy at law in replevin existed in favor of the plaintiff to recover the property held in execution and the injunction should be denied for that reason, as was done in St. Louis, etc., R. Co. v. Lowder, 138 Mo. 533, 39 S. W. 799.

The judgment should be affirmed. It is so ordered.  
All concur.



STATE ex rel. HENRY OSTMANN, Appellant, v.  
WALDO P. HINES et al., Respondents.

St. Louis Court of Appeals, May 3, 1910.

1. **ASSAULT AND BATTERY: Sheriffs: Arrest Under Warrant: Evidence: Warrant Competent Evidence.** In an action on a sheriff's bond, for assault and battery alleged to have been committed on relator by the sheriff in making an arrest of relator under a warrant, it devolved on relator to show the officer was acting within the scope of his authority, in order to affix liability against a surety on the bond, and the warrant itself was the best evidence of that fact.
2. ———: ———: ———: ———: ———: **Exclusion Harmless Error.** But where the answer expressly admitted that the sheriff was acting under a warrant, the exclusion of the warrant was harmless error.
3. ———: ———: ———: ———: **Dismissal of Charge Immaterial.** That the charge against one, on which the warrant on which he was arrested was issued, was afterwards dismissed without prosecution, is immaterial in an action for assault and battery by the sheriff in making the arrest.
4. ———: ———: ———: **Powers of Officers.** An officer in making an arrest may use such force as appears to him at the time to be reasonably necessary to overcome the resistance put forward, but he is not required to nicely gauge the precise quantum of force necessary to overcome the resistance.
5. ———: **Prima Facie Case.** In a civil action for damages on account of an assault and battery between private persons, a prima facie case is made by merely showing defendant applied a very slight degree of force to plaintiff in anger, and it then rests with defendant to justify it.
6. ———: **Sheriffs: Arrest Under Warrant: Use of Necessary Force: Burden of Proof.** The burden of proof, in a suit against an officer and the surety on his bond for assault and battery by the officer in making an arrest under a warrant, is on the one suing, to show the officer used more force than was reasonably necessary to effect the arrest; not on defendants to show the contrary, the presumption being that he performed his duty in accordance with the law.

Appeal from Lincoln Circuit Court.—Hon. James D.  
Barnett, Judge.

AFFIRMED.

*Wm. H. Clopton, Frank Howell and R. L. Sutton*  
for appellant.

(1) The court erred in giving to the jury instruction No. 9 on behalf of defendants. The instruction is erroneous in that it places the burden on plaintiff to disprove the plea of justification set up in the answer. The answer admits the beating of plaintiff with fists and billy and undertakes to justify this violence by alleging resistance on the part of the plaintiff and that the beating was necessary to overcome the resistance and to protect the officers against plaintiff's assault. This was an affirmative defense. The warrant alone did not justify the use of force and violence. It was necessary to justify the force and violence admitted to have been used by defendants, for the defendants to allege and prove that forcible resistance or an attempt to escape was made. *R. S. 1899, sec. 2541; State v. Hancock, 73 Mo. App. 22; State v. Mahon, 3 Harr. (Del.) 569; Daily v. Houston, 58 Mo. 369; Thomas v. Werremeyer, 34 Mo. App. 671; Sloan v. Speaker, 63 Mo. App. 325; O'Leary v. Rowan, 31 Mo. App. 119; Happy v. Prichard, 111 Mo. App. 10; Orscheln v. Scott, 90 Mo. App. 366.* (2) The rule is that a party alleging an affirmative defense has the burden of proving such defense. *Cox v. Railroad, 128 Mo. 362; State ex rel. v. Fidelity & Deposit Co., 94 Mo. App. 197; Rivers v. Glass Co., 81 Mo. App. 379; Bank v. Taylor, 69 Mo. App. 105; Grier v. Railroad, 108 Mo. App. 569.* (3) This is always the rule where the defendant pleads in confession and avoidance. *St. Louis Tow Co. v. Orphan B. I. So., 52 Mo. 530; Whiteside v. Tall, 88 Mo. App. 172; Gray's Harbor Com. Co. v. Bank, 74 Mo. App. 638.* (4) It is universally held that, where the defendant justifies under the plea of *son assault demesne*, the burden of proof is on the defendant to show by a preponderance of the evidence that the plaintiff

committed the first assault and that the defendant used no more force than was reasonably necessary to defend his person against plaintiff's first assault. *Happy v. Prichard*, 111 Mo. App. 10; *Orscheln v. Scott*, 90 Mo. App. 366; *Rogers v. Waite*, 44 Me. 277; *Gizler v. Witzel*, 82 Ill. 326; *Fredrick v. Gilbert*, 8 Pa. St. 456; *Manson v. Lewis*, 101 N. W. (Wis.) 1095; *Morgan v. Mulhall*, 214 Mo. 459; *Johnson v. Daily*, 136 Mo. App. 534.

*Norton, Avery, Woolfolk & Young, Theodore C. Bruere and C. W. Wilson* for respondent.

(1) The instructions given by the court cover fully every phase of the case. Where this is true a judgment will not be reversed, even though the trial court refused to give some instructions that properly declared the law. *Keen v. Schnedler*, 92 Mo. 516. (2) The plaintiff's refused instructions were not proper declarations to go to the jury and were properly disallowed by the trial court. (3) The instructions given to the jury at the instance of the defendants were proper declarations of the law of the case. (4) The plaintiffs asked and the court at his request gave instructions which announced to the jury as the law of the case, the same doctrine that is contained in the instructions given at the instance of the defendants, to which he now objects. He will not be heard to complain that the instructions are erroneous. *Keen v. Schnedler*, 92 Mo. 516.

NORTONI, J.—This is a suit for damages alleged to have accrued to relator as a result of an assault and battery. The finding and judgment were for defendants and relator prosecutes the appeal. The suit proceeds against defendant Hines as sheriff and the American Bonding Company, the surety on his official bond, as for an unlawful assault under color of his office. The testimony on the part of the relator tended to prove that while he, in company with his son, a grown man,

was walking down a street in the city of St. Charles, the defendant sheriff, together with his deputy Kelsick, accosted him with the remark that he had a warrant for his arrest. Relator says he requested the defendant to read the warrant, which he did, and that after reading it he requested the defendant to read it a second time, which he declined to do, but instead laid hold of relator in a rude and angry manner as though he intended to take him to jail. Relator and his witnesses testified that, notwithstanding he said he would go willingly with the defendant, the sheriff's deputy struck him a heavy blow with his fist and knocked him down in the street and that this assault was immediately followed up by the defendant sheriff, who hit him several blows over the head with an instrument known as a rubber "billie."

On the part of defendant, the testimony tends to prove the sheriff had a warrant for relator directing his arrest on the charge of having committed a misdemeanor and he, in company with his deputy Kelsick, accosted relator on the street and informed him of the fact; that thereupon relator requested the defendant sheriff to read the warrant, which he did, and after having read it once to relator he insisted the sheriff should read it a second time. The sheriff and his deputy testified that the sheriff requested the relator to accompany him to the office of the justice of the peace and he would further explain the warrant to him, which relator declined to do, saying, "I won't do any such a d—n thing." The defendant sheriff further says that thereupon he reached out to take hold of the relator and relator struck at him with his fist, which blow he dodged; that just at that time Kelsick, the deputy, hit relator and knocked him into the street. As the deputy sheriff struck relator, his son, Henry Ostmann, Jr., leveled a blow at defendant which blow the defendant dodged as well and in turn hit relator's son on the head with his fist. By that time Ostmann was fighting the sheriff's deputy Kelsick in the street with great force, and defendant, to the end of

subduing him, hit the relator over the head two or three blows with a rubber "billie." Having thus in a measure overcome relator, the two officers took him by the arms, one on either side, and marched him backwards for nearly a block up the street to the jail.

The theory of the case on the part of relator is that he made no resistance whatever at the time the sheriff took him into custody and the assault upon him was without any justification. He says, too, that when he was being pushed backwards by the officers up the street to the jail, he repeatedly requested them to desist their force and permit him to go to the office of the justice of the peace and make a bond for appearance. On the other hand, it is the theory of the defendants, and their testimony tends to prove, that relator resisted the arrest from the first with great force and besides making an assault upon the defendant sheriff and his deputy even resisted after he was partially subdued and thus compelled them to push or almost carry him backwards for a considerable distance towards the jail. The relator sought to introduce in evidence the warrant and proceedings before the justice of the peace, who issued the same, which showed, among other things, that the charge against him on which the warrant was issued was subsequently dismissed without prosecution. This being excluded by the court, an argument for a reversal of the judgment is predicated thereon. We believe in the state of the pleadings there is no harmful error in excluding this matter. The warrant alone was all that was competent on that score. The other facts disclosed in the proceedings before the justice were without influence on the issue being tried in this case. It is true in this suit on the sheriff's bond, it devolved on relator to show the officer was acting within the scope of his authority in order to affix liability against the surety on the bond and the warrant itself was the best evidence of the fact. That the sheriff was acting in his official capacity at the time is clear. Indeed, there was no issue as to this

in the case for besides the petition alleging the sheriff held and was acting under a warrant, the answer expressly admitted the fact as well. In this state of the pleading, while it would have been well enough to admit the warrant in evidence, there was certainly no prejudicial error in excluding it, for the only fact of which it was competent evidence was conceded throughout the case.

Among other things, the instructions for defendant told the jury that if it found the sheriff had a warrant for relator's arrest and that he informed him of that fact and read the warrant to him, that relator declined to submit to arrest but resisted the same with force and that relator was fighting Kelsick, the deputy, in resisting such arrest, then the defendant had the right, and it was his duty, to use such force and to strike Ostmann such blows as appeared to him to be reasonably necessary to overcome his resistance in making the assault on Kelsick and to effect relator's arrest. That portion of the instruction telling the jury that under the circumstances stated the defendant had a right to use such force and to strike Ostmann such blows as appeared to him at the time to be reasonably necessary to overcome his resistance, etc., is criticised. It is said that though it is clear the sheriff had a right to use such force as appeared to him reasonably necessary at the time to overcome the assault being made by Ostmann on his deputy, it is error to inform the jury that he had a right to strike such blows as appeared to be necessary, etc. Abstractly speaking, the criticism is correct enough, for the law does not say in so many words that an officer may strike such blows as appear to him to be reasonably necessary under the circumstances mentioned. The rule is the officer may use such force as appears to him at the time to be reasonably necessary to overcome the resistance put forward, but, of course, in those circumstances he is not required to nicely gauge the precise quantum of force essential to overcome the

assault. He is to act as a reasonable man upon the appearance of danger and its imminence at the time. Be this as it may, we are not persuaded the use of the words "strike such blows" in this connection infringed the rights of relator. If the evidence of the defendant sheriff and his witnesses is to be believed, then relator was making a serious resistance to arrest in which he was aided and abetted by his son who was present. It seems he instituted a vigorous fight with his fists against the sheriff by striking one blow at him and continued the same in the street against Kelsick, the deputy. In these circumstances, it seems the sheriff, in striking the blows referred to, pursued the proper course to overcome the resistance. Viewing the instructions in the light of the facts to which they were applied, we see no erroneous direction therein contained.

The real question in the case and that which has been put forward by counsel with much force to the end of reversing the judgment relates to the burden of proof. For the defendant, the court instructed the jury the burden of proof was on the relator and that before he could recover he must prove to the satisfaction of the jury by the greater weight of the evidence that in arresting relator defendant and his deputy used more force than appeared to them to be reasonably necessary to effect his arrest. It is argued this was error, for the reason the burden rested with defendant to justify the assault upon relator by showing that no more force was employed than appeared to be reasonably necessary under the circumstances of the arrest. There can be no doubt that it is the rule in civil actions for damages on account of assault and battery between private persons the plaintiff may make a *prima facie* case by merely showing the defendant applied a very slight degree of force to him in anger. In such circumstances the assault is presumed to be unlawful and it then rests with the defendant to justify it; that is to say, if the assault is *prima facie* shown or admitted, defendant must both

plead and prove a justification for making the same as though the plaintiff made the first assault and defendant used no more force in repelling the attack than appeared to be reasonably necessary, etc. [Orscheln v. Scott, 90 Mo. App. 352; Johnson v. Daily, 136 Mo. App. 534, 118 S. W. 530; 2 Greenleaf on Evidence, sec. 99.] But this doctrine should not obtain if the suit is against an officer clothed with the warrant of the law and proceeds as well on his official bond. It is true in either case, whether the action is against a private individual or an officer acting under a warrant, the assault must be shown to be unlawful before a recovery may be allowed. Every assault involves an attempt to unlawfully apply force to another and a battery involves the unlawful touching of one by the aggressor. [2 Am. and Eng. Ency. Law (2 Ed.), 953.] So it is the unlawful touching of one person by another in anger may constitute an assault and battery as between private individuals. However the law vouchsafes to an officer clothed with its warrant the authority and right to touch the person. In other words, while it may be unlawful in given circumstances for a private individual to touch the person of another, it is entirely lawful for an officer clothed with a warrant to do so, provided he uses no more force than is reasonably necessary. [State v. Mahon, 3 Harr. (Del.) 568.] As it is essential in every instance to constitute an assault and battery that the force used must be unlawful, it is entirely clear that the employment of such force only as appears to be reasonably necessary to the execution of a lawful act on the part of an officer does not constitute a battery. In other words, the very idea of a battery committed by an officer in making an arrest under warrant involves the idea as well that more force was used than was reasonably necessary, otherwise it is not unlawful at all. An officer clothed with the warrant of law is answerable in damages as for assault and battery only when in the performance of his duty in making the arrest he uses more force than is



reasonably necessary for its accomplishment. [2 Am. and Eng. Ency. Law (2 Ed.), 961.] This being true, it devolves upon the plaintiff to prove not only that the officer touched him in making the arrest but that he used more force thereabout than was reasonably necessary to effect the arrest. The burden of proof, therefore, is different in a case when the suit is against the officer acting under warrant than in those cases where it proceeds against a private individual. For the mere touching of a person under the circumstances mentioned in the case of a private individual invokes the presumption that it was unlawful and renders it incumbent on the defendant to overcome such presumption by justifying the act. As to the officer acting under a warrant the presumption goes to the effect that he performs his duty in accordance with the law and the burden rests upon the plaintiff asserting a proposition to the contrary to overcome the presumption by showing that more force was used in effecting the arrest than was reasonably necessary to accomplish it. Indeed, to recover against the surety on his official bond, as is sought here, the burden is on the plaintiff at least to show a breach of the bond and to do this he must not only prove the officer acted in virtue of his office but proceeded beyond the limitations of the law with respect to his duty as well. Unless this is shown no breach of the bond will appear, for until the officer exceeds his authority, the surety may not be called upon to answer.

We believe the rule announced with respect to the burden of the proof by our Supreme Court in *Nichols v. Winfrey*, 79 Mo. 544 obtains here. In that case the suit was under our statute, Lord Campbell's Act, giving the widow a right of action for the wrongful death of her husband. It proceeded against the defendant as though he had wrongfully killed the plaintiff's husband in a physical encounter, and the Supreme Court ruled that as the cause of action arose only upon the wrongful killing of the deceased the burden rested upon plain-

tiff to show that the death of her husband was not justified under the circumstances of the altercation. In that case, as in this one, the plaintiff is required to show more than a mere assault, for no cause of action exists in either instance unless more force was employed by the defendant than was necessary to the end sought to be accomplished.

The court gave nine instructions on the part of the plaintiff and presented the single issue of fact for him from every conceivable view point. The instructions given seem to be fair and just and none were refused which were not fully covered in those given. We have examined the several other questions presented in the brief and do not consider them of sufficient merit to warrant discussion in the opinion. The case seems to have been well tried and the judgment should be affirmed. It is so ordered. All concur.

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STATE ex rel. HENRY OSTMAN, Appellant, v.  
WALDO P. HINES, etc., et al., Respondents.

St. Louis Court of Appeals, May 3, 1910.

1. **ABATEMENT OF SUITS: Pendency of Prior Action.** Where two suits are pending between the same parties on the same cause of action, the subsequent suit will be abated on the ground it is vexatious and oppressive.
2. ———: ———: **Effect of Dismissal of Prior Action.** A suit will not be abated because when it was instituted a prior suit for the same cause of action was pending, if before the hearing on the plea in abatement, the prior suit is dismissed.
3. **DISMISSAL OF SUITS: In Open Court: Statute.** Section 1979, Revised Statutes 1899, which authorizes dismissal of suits in vacation, upon payment of costs, has no application to an attempt to dismiss in term time and in open court.
4. ———: **Discretion of Court.** Courts have a latent discretion in the allowance or denial of a voluntary termination of a suit

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State ex rel. v. Hines.

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by plaintiff, and while its discretion is not to be exercised arbitrarily, yet where the discontinuance or dismissal would be inequitable, it may be denied altogether or granted only on such terms as the ends of justice require.

5. —: **Order of Court Necessary: Abatement of Suits: Pendency of Prior Action.** It is necessary for the voluntary dismissal of a suit that the court exercise its discretion in the matter and enter an order of dismissal, so that, the plaintiff having merely filed in open court a memorandum dismissing it, it is still pending, and available under a plea in abatement of a second suit on the same cause of action.

Appeal from Franklin Circuit Court.—*Hon. R. S. Ryors, Judge.*

AFFIRMED.

*Wm. H. Clopton and James Booth* for appellant.

(1) If different proofs are required to sustain the two actions, a judgment in one is no bar to the other. *Warder v. Henry*, 117 Mo. 541; *Garland v. Smith*, 164 Mo. 22; *Callahan v. Davis*, 125 Mo. 35. The same rule applies to a plea of another action pending under the statute. *Rodney v. Gibbs*, 184 Mo. 10. (2) The grounds upon which courts proceed in abatement of subsequent suits is that they are unnecessary, and are therefore deemed vexatious and oppressive. But the modern practice is not to infer as a matter of law, that a subsequent suit is vexatious and unnecessary from the pendency of a former suit between the same parties, but to proceed upon the inquiry into the actual circumstances of the two cases, and then determine as a matter of fact whether the subsequent suit is vexatious. *State ex rel. v. Dougherty*, 45 Mo. 297; *Jacobs, Admr., v. Lewis*, 47 Mo. 344; *Warder v. Henry*, 117 Mo. 530; *Bernecker v. Miller*, 44 Mo. 102.

*J. B. Garber, T. C. Bruere, and C. W. Wilson* for respondents.

(1) Respondents insist the appeal should be dismissed for failure to comply with rules 14 and 15 of

the rules of practice of this court, in conformity to rule 21. Rules of Practice, rules 14, 15 and 21. (2) If the court considers the case on its merits, it should affirm the judgment below. (a) The trial court found under the evidence that there was pending, in this State, a prior suit between the same parties and for the same cause. Upon this finding, there was nothing for the court below to do, but to abate or dismiss the action. (b) Every inference is to be indulged in favor of the correctness of the trial court's findings on the issue of fact. (c) On the evidence adduced, the trial court could well have found that the evidence failed to show that the second count in the petition in the case pending in the Lincoln Circuit Court had been dismissed. (d) But even if it had been clearly disclosed that plaintiff had dismissed the second count of his petition in the Lincoln Circuit Court, the cause was still pending there, and plaintiff was at liberty to amend his petition in that court, and reinstall the second count at any time. (e) The Lincoln Circuit Court had full jurisdiction of the whole matter, and having complete jurisdiction, it would be utterly improper for the Franklin Circuit Court to assume jurisdiction over the same subject-matter. *Donnell v. Wright*, 147 Mo. 647; *Spratt v. Early*, 199 Mo. 501; *Pond v. Huling*, 125 Mo. App. 481. (f) A finding in favor of the plaintiff on the first count of the petition at the Lincoln Circuit Court, would have been a bar to a recovery on the second count in the Franklin Circuit Court. The causes of action set forth in the first and second counts, were part and parcel of one and the same transaction. The law does not countenance or encourage, the splitting up of an action into a number of separate suits. *Boeger v. Langenberg*, 97 Mo. 390.

NORTONI, J.—This is a suit for false imprisonment. It originated in the circuit court of St. Charles county and was removed on change of venue to the circuit court of Franklin county. The finding and judg-

ment were for defendant and relator prosecutes the appeal.

The matter in judgment arises on a plea in abatement to the effect that another suit on the same cause of action was then pending between the parties which in turn presents the question as to the essentials requisite to the dismissal and termination of a suit pending in a court of competent jurisdiction. In other words, the inquiry is as to what, if anything, besides the filing of a memorandum to that effect by relator, is essential to operate the dismissal of a cause of action pending in court.

The material facts giving rise to the question are as follows: Relator instituted this action for false imprisonment against defendant Hines, the sheriff of St. Charles county, and the American Bonding Company, surety on his official bond. It is set forth in the petition that the defendant Hines, sheriff, etc., appeared before a justice of the peace and swore out a warrant charging relator with a breach of the peace and thereafter effected his arrest thereunder; that upon the arrest being made, relator offered immediately to go before a justice of the peace and execute a bond or recognizance for his appearance, as was his right under the statute, but defendant Hines arbitrarily refused his request and, notwithstanding his protestations, lodged him in the common jail of St. Charles county and there restrained him of his liberty for a considerable time; that the sheriff continued and persisted in his refusal to permit relator to go before a justice of the peace and execute bond for his appearance and relator was compelled to employ counsel before he was permitted to regain his liberty by giving bond, etc. It is averred, too, that on the day set for his trial, the prosecuting attorney, with the advice and consent of the defendant Hines, dismissed the charge against him and refused to prosecute him thereon.

The theory of the petition we believe is, that though the arrest was lawful in the first instance, having been under warrant, the imprisonment thereunder and denial of relator's right to give bond was contrary to the statute and affords a cause of action for the unlawful restraint of relator's liberty. In their answer, defendants pleaded in abatement to the effect that another suit between the same parties for the same cause of action was then pending in the circuit court of Lincoln county and prayed to be discharged from further answering in the present action. At the hearing on this plea in abatement, defendants introduced in evidence a certified copy of the records of the case in *State ex rel. Henry Ostman, plaintiff, v. Waldo P. Hines and the American Bonding Company, defendants*, then pending in the circuit court of Lincoln county. From this transcript, it appears relator, some time prior to the institution of the present suit, had instituted a suit in two counts in the circuit court of St. Charles county against the present defendant Hines, sheriff, etc., and the American Bonding Company, the surety on the sheriff's official bond. The first count in the petition in that case set forth as facts that defendant Hines appeared before the same justice of the peace on the same date referred to in the petition in the present suit and swore out a warrant for relator's arrest on a charge of disturbing the peace; that in executing said warrant and taking relator into custody thereunder, he assaulted and cruelly beat relator, etc. In fact, the first count of the petition in that action proceeds as for an assault and battery without cause by the sheriff in executing the warrant of arrest and for this damages are prayed and a recovery is sought.

The second count of the petition in that case, which is for false imprisonment, is, in all material respects, identical with the language in the petition in the cause now in judgment. Indeed, the second count of the petition in the Lincoln County Circuit Court proceeds and seeks a recovery against

these same defendants for the identical false imprisonment alleged and relied upon in relator's petition in the present cause. There is no controversy between the parties as to this particular feature of the matter; in other words, it stands conceded that the present suit is between the same parties and for the identical cause of action as set forth in the second count of relator's petition in the case in the Lincoln Circuit Court. The question in controversy between the parties here relates rather to the fact as to whether or not the second count of relator's petition in the Lincoln County Circuit Court had been dismissed before the institution of the present suit. The relator insists that he had dismissed the second count of his petition or his suit for false imprisonment pending in the Lincoln Circuit Court before he instituted the present action and the defendants insist otherwise. In other words, defendants insist that though relator's counsel filed a memorandum of dismissal of the second count of his petition, during the term, in open court, in Lincoln county, the cause of action therein set forth remained pending for the reason the court did not act on such memorandum and order the dismissal.

When it appears that two suits are pending between the same parties on the same cause of action, the courts will abate the subsequent suit on the grounds that it is vexatious and oppressive. The law abhors a multiplicity of actions and favors the peace and repose of society instead. If there is identity of both parties and cause of action in two suits pending, the subsequent suit must always abate. There can be no doubt that the court properly abated the present suit between the same parties for the identical cause of action as that involved in the second count of the petition in Lincoln county, unless it appears the count on the same cause of action had theretofore been dismissed and the suit as to that subject-matter terminated in the Lincoln County Circuit Court. [Warder v. Henry, 117 Mo. 530, 540, 541, 23

S. W. 863; *Jacobs v. Lewis*, 47 Mo. 344; *Bond v. White*, 24 Kan. 45.] It is the rule, too, in this State, that the plaintiff may dismiss his former suit, even after instituting the second on the same cause of action, and upon showing this fact, proceed to judgment in the subsequent action. In other words, a subsequent suit between the same parties on the same cause of action will not be abated merely on the ground that a prior suit was pending at the time the subsequent suit was instituted if it appears the prior action was dismissed before the hearing is had on the plea in abatement in the subsequent suit. [*Warder v. Henry*, 117 Mo. 530, 541, 542, 23 S. W. 863.]

The relator relies upon the fact that he filed a memorandum, in open court, dismissing the second count of his petition in the circuit court of Lincoln county and says that this terminated that suit on the present cause of action to all intents and purposes. The record of the Lincoln County Circuit Court introduced in evidence touching the matter is as follows:

"State ex rel. Henry Ostmann, Plaintiff, v. Waldo P. Hines and American Bonding Company, Defendants. On Sheriff's Bond.

"Now at this day comes the plaintiff herein, by his attorneys, and files his Memoranda of Dismissal of the second count of the petition in this cause."

It is conceded that this entry relates to the identical cause of action relied upon in the prior suit between the same parties and that it was made some time before the hearing on the plea in abatement in the present suit but nothing more appears in the record before us. Indeed, this is all of the evidence relied upon to show hearing on the plea in abatement in the present suit, which is conceded to have been pending between the same parties on the same cause of action. It is argued by defendant that though it appears relator signified his intention to dismiss the prior suit, the cause remained pending until the court ordered its dismissal.



There are several sections of our code which relate to the dismissal of suits and the withdrawal of parts of a petition. Section 1979, Revised Statutes 1909, Ann. St. 1906, sec. 797, authorizes the dismissal of suits upon the payment of costs as therein indicated in vacation. This section is not relevant here for the reason whatever was done in this matter was in term time and in open court. Section 1855, Revised Statutes 1909, Ann. St. 1906, sec. 664, authorizes the plaintiff at any time, before the jury is sworn or the cause submitted to the court on motion, with reasonable notice to the adverse party, to strike out or withdraw any part of his petition.

Nothing appears to indicate that relator proceeded under this section of the statute. Besides failing to show that reasonable notice was given to the adverse party, the record indicates that instead of seeking to strike out or withdraw any part of this petition in the sense of the statute, plaintiff sought to dismiss the cause of action set forth in the second count thereof. Section 1980, Revised Statutes 1909, Ann. St. 1906, sec. 639, provides, "The plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury, or to the court sitting as jury, or to the court, and not afterward." This section authorizes the plaintiff, generally speaking, to dismiss his suit. However, even under this statute, the plaintiff may not dismiss in every case. There are a number of instances in which the rights of the adverse party may become so far fixed as to preclude the plaintiff from dismissal but that is unimportant here. As a general proposition, the plaintiff may dismiss his suit under this statute as therein indicated. [In re Estate of Howard, 128 Mo. App. 482, 107 S. W. 398.] But something more is required than the mere signification of an intention to that effect on the part of the plaintiff. A case once legally commenced in a court of competent jurisdiction continues until some affirmative action is shown in the

record of the court discontinuing it. [Bond v. White, 24 Kan. 45.] And an entry of dismissal by the plaintiff is insufficient of itself to operate such discontinuance. [Allen v. Dodson, 39 Kan. 220; Ringle v. Wallis Iron Works, 92 Hun. (N. Y.) 279; Barnes v. Barnes, 95 Cal. 171.] Although there can be no doubt of the relator's right to dismiss the second count of his petition in the instance now in judgment, as the matter involved therein is not such as to justify the court under all circumstances in refusing to make the order, it is entirely clear that the court had some discretion in the premises. Even if an order of dismissal is actually entered, the matter is so much within the discretion and control of the court that the order may be vacated during the term if the interests of justice require it. Indeed, it is laid down as a general rule that under every form of procedure, the court exercises a latent discretion in the allowance or denial of a voluntary termination of a suit by the plaintiff. It is true this discretion is not to be exercised arbitrarily or in defiance of the rights of the plaintiff, but nevertheless, where the discontinuance or dismissal of the action would be inequitable, it may be denied altogether or granted only on such terms as the ends of justice require. [6 Ency. Pl. and Pr., 869, 870, 871, and cases in the notes.]

It therefore appears that in order to operate the dismissal or discontinuance of a suit pending, there must be an order of the court to that effect to the end that it may appear the discretion involved has been exercised and a judgment given thereon. Of course, this order must appear on the proper records of the court. It is said that under the code procedure there can be no valid discontinuance or dismissal of a suit without an order of the court to that effect. [6 Ency. Pl. and Pr., 868, 869, 870, 871, 872, 873.] Numerous cases might be cited in support of the proposition stated. See Allen v. Dodson, 39 Kan. 220; Carleton v. Darcy, 75 N. Y. 375; Bishop v. Bishop, 7 Robt. (N. Y.) 194; Trow

Printing, etc., Co. v. New York, etc., Co., 16 N. Y. Civ. Proc. 120; Ringle v. Wallis Iron Works, 92 Hun (N. Y.) 279; Barnes v. Barnes, 95 Cal. 171; Page v. Superior Court, 76 Cal. 372. Indeed, the doctrine is that until the court acts upon the plaintiff's application and exercises its discretion by actually giving an order dismissing the cause, it retains jurisdiction for further proceedings and judgment. [Barnes v. Barnes, 95 Cal. 171; Campbell v. Carroll, 35 Mo. App. 640.] The case last cited was one in which the plaintiffs had exercised their right to dismiss an injunction suit in vacation, under section 1979, Revised Statutes 1909, Ann. St. 1906, sec. 797, instituted by them. There they paid the costs accrued and dismissed the suit in vacation of the court by filing a memoranda to that effect with the clerk. The defendants in that case treated the plaintiff's dismissal as valid and thereafter instituted an action for damages on the injunction bond. On appeal of that case, this court declared the action on the bond would not lie for the reason the injunction suit was still pending. It appearing the circuit court in term time had omitted to enter an order of dismissal, it was ruled that court retained jurisdiction of the injunction suit for the purpose of assessing damages on the injunction bond notwithstanding the fact that plaintiffs had filed a memorandum of dismissal and paid the costs in vacation as provided in the statute, *supra*.

It appearing that the Circuit Court of Lincoln county entered no order dismissing the count on the same cause of action, the judgment of the trial court to the effect that the same was then pending in a prior suit between the same parties should be affirmed. It is so ordered. All concur.

**W. R. HALL GRAIN COMPANY, v. LOUISVILLE &  
NASHVILLE RAILROAD COMPANY, Appellant.**

St. Louis Court of Appeals, May 3, 1910.

1. **COMMON CARRIERS: Delay in Transportation: Pleading: Action in Tort.** A petition in an action by a shipper against a carrier, which alleges that the carrier received certain corn for shipment, and agreed well and safely to carry it to destination and deliver it in as good condition as when received, and that, in violation of its agreement and in disregard of its duties, it so negligently conducted itself as to cause damage to the property, in that it negligently delayed transportation and delivery after arrival at destination, states a cause of action in tort and not in contract, the averment that defendant agreed well and safely to carry the corn to destination and deliver it in as good condition as when received being intended as matter of inducement and to show defendant undertook with plaintiff to act as a common carrier, thus serving as a basis for essential averments showing it violated the duties imposed on it as a common carrier.
2. ———: ———: ———: **Variance Between Pleading and Proof.** The variance between a petition, in an action by a shipper against a carrier, which alleges that the carrier agreed to deliver at designated places to third persons, and the proof, which shows that the bills of lading named the shipper as consignee and contained directions to notify the third persons, is immaterial, as the carrier undertook to turn the freight over at destination to the third persons, on their presenting the bills of lading showing they were the persons authorized to take charge of the shipments.
3. ———: ———: **Rule of Terminal Carrier for Precedence in Handling Cars: Proximate Cause: Question of Fact.** Where a carrier of corn for delivery to an elevator for drying, negligently delayed the transportation, and thereby caused the cars to lose the precedence they would have enjoyed if carried promptly, under a rule providing for the sending of cars to the elevator in the order of their arrival, the question of liability for injury to the corn, in consequence of its late arrival at the elevator, was one of fact, on it being assumed the rule afforded a valid excuse for failure to deliver promptly.

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4. ———: ———: **Change of Climate Causing Damage: No Defense.** Where, in an action against a carrier of corn for delivery to an elevator for drying, the evidence showed the corn would not have spoiled if it had been turned into the elevator on arrival, the carrier could not relieve itself from liability on the ground the corn spoiled in consequence of a change of climate.
5. ———: **Rule of Terminal Company for Precedence in Handling Cars: Does not Relieve Carrier from Liability.** A carrier had an arrangement with an elevator company by which it turned into the elevator for storing and drying any grain that arrived in its yards. It was the rule of the railroad to turn into the elevator such cars in the order of their arrival in the yards. The elevator was not a party to prescribing this rule, nor had it agreed to be bound by it. A shipper who delivered corn to the carrier for delivery at the elevator for drying had no knowledge of this rule. The carrier was negligent in delaying the transportation of the corn, and in delivering the same after arrival to the elevator, so that the corn spoiled. *Held*, that the carrier was liable for the injuries sustained, because it was bound to deliver the corn in a reasonable time, and where the consignee called for the same within a reasonable time, notifying the carrier that the corn was shipped to be dried and required immediate handling, the refusal to deliver because there were other car loads of grain that had precedence under its rule did not relieve it from liability.
6. ———: ———: **Failure to Present Bill of Lading.** A carrier delaying the delivery of freight may not excuse the delay on the ground that the bills of lading were not presented, where it did not decline to deliver on that ground.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

**AFFIRMED.**

*Bryan & Christie* and *H. R. Small* for appellant.

(1) The finding and verdict and judgment are for the plaintiff on each of the seven counts alleged in plaintiff's amended petition, although there was a failure of proof upon each of the causes of action alleged in each of said counts of plaintiff's amended petition. *Ingwerson v. Railroad*, 205 Mo. 328. (2) Disregarding the allegations in the first five counts of plaintiff's amended

petition, plaintiff's evidence conclusively showed no right to recover on any theory, pleaded or unpleaded: First, because by such evidence it was shown that the corn was uninjured when it arrived at Nashville and when notice of arrival to the notified party was given. Second, because by such evidence the damage to the corn was shown to have taken place at Nashville and was due to the fact that it was brought from a northern to a southern climate by plaintiff with the certain consequence that it would germinate as it and thousands of other cars did during the notably hot, wet spring of 1907. *Freeman v. Railroad*, 118 Mo. App. 526, 533. Third, because after notice of arrival it was defendant's duty to deliver only in accordance with the bill of lading direction of plaintiff to the holder of the bill of lading on its surrender, and in case the holder failed to surrender the bill of lading for the corn, the duty remained in defendant as a warehouseman to use reasonable care to hold or store the grain for the account of the owner, and because by plaintiff's own evidence it was shown that plaintiff did not surrender the bill of lading for the ten cars of corn destined to Nashville until one month after notice of arrival had been given, and because because during that month, by plaintiff's own evidence, defendant, as a warehouseman, fully performed its duty. *Lyons v. Railroad*, 119 N. Y. S. 703; *F. H. Smith Co. v. Railroad*, 122 S. W. 342. Fourth, because by plaintiff's own evidence plaintiff negligently failed under the adverse atmospheric and congested traffic conditions at Nashville to take charge of the corn after notice of arrival had been given and so contributed to cause the injury to the corn, and so is barred from recovery. *Hardin Grain Co. v. Railroad*, 134 Mo. App. 681. Fifth, because defendant, at common law or by contract, either as a carrier or as a warehouseman, is not held to an insurable liability for the consequences of delay. The liability is for negligence only in case of delay. *Thompson on Neg.*, sec. 5451. (3) Even if the evidence under

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the first five counts disclosed a right in plaintiff to recover, but not the right claimed in the amended petition, plaintiff cannot recover. Plaintiff cannot sue on one cause of action and recover on another. *Ingwerson v. Railroad*, 205 Mo. 328. (4) So confusing is the amended petition as to the theory of plaintiff that the trial court treats the suit as in contract, while the plaintiff treats it as in tort. For this reason a new trial should have been granted. *Pipe Co. v. Railroad*, 137 Mo. 479. (5) The bill of lading contract proven was a contract to carry only over defendant's own lines. *Nenno v. Railroad*, 105 Mo. App. 540, and cases there cited; *Railroad v. Stone* (Tenn.), 105 Am. St. Rep. 955; *Myrick v. Railroad*, 107 U. S. 102; *Grain & Elevator Co. v. Railroad*, 138 Mo. 658. A railroad company is only bound, in the absence of a special contract, to safely carry over its own road and safely deliver to the next connecting carrier. *Grain & Elevator Co. v. Railroad*, 138 Mo. 658; *Myrick v. Railroad*, 107 U. S. 102; 4 *Elliott on Railroads*, sec. 1433; *Hutchinson on Carriers* (3 Ed.), sec. 233. Defendant is alleged and shown to be the initial carrier and other unnamed carriers are alleged to be connecting carriers, who complete the carriage to Athens. The proof wholly fails to show that the car of corn referred to in the sixth count was damaged.

*R. P. & C. B. Williams* for respondent.

(1) At the time the shipments in question were received, the defendant knew of the congested condition in the yards at Nashville, and plaintiff had no knowledge of such conditions. Under such circumstances, the defendant cannot set up such conditions as a ground for non-liability. *Grain Co. v. Wabash*, 114 Mo. App. 496; 2 *Hutchinson on Carriers*, sec. 496, and cases cited; *Schwab v. Railroad*, 13 Mo. App. 151. The rule declared by the court in instruction 5 as to the measure of damages in this case is the correct rule. That is to say, the

measure of recovery is the difference between the market value of the corn, kiln dried, at the time same should have been dried by said elevator company, and the market value of said corn at the time the same was actually dried by said elevator company, with 6 per cent interest on the said amount, and such other damages as have naturally and proximately resulted from the injury. 3 Hutchinson on Carriers, sec. 1362; Matney v. Railroad, 75 Mo. App. 235; Shelby v. Railroad, 77 Mo. App. 211; Matney v. Railroad, 75 Mo. App. 233; Heil v. Railroad, 16 Mo. App. 363. (2) Upon the question of value, evidence of actual sales of the same kind and quality of property as that in question is admissible. 1 Elliott on Evidence, sec. 182, and cases cited; Maffett v. Hereford, 132 Mo. 518; Sinclair v. M., K. & T., 70 Mo. App. 596, 16 Cyc. 1141; Rickey v. Tenbrook, 63 Mo. 563. (3) The defendant's duty as a common carrier was not ended when it carried the shipments to Nashville, Tenn., and notified the Nashville Warehouse Elevator Company, but such duty continued until the shipments were delivered on the tracks of the elevator company. 4 Elliott on Railroads, sec. 1518. (4) The evidence shows that the other seven cars which went along with the shipments in question, and which reached Nashville at about the same time as the shipments in question, were delivered on time and promptly dried by the elevator company. (5) The defendants seem to have overlooked the point that the relation between the shipper and the carrier is always contractual. Under the authorities in this State, plaintiff's petition proceeds upon the theory of an action *ex delicto* for the defendant's breach of duty arising out of its common law liability. Heil v. Railroad, 16 Mo. App. 363; 3 Hutchinson on Carriers, secs. 1333, 1351. (6) The fact that the plaintiff says in its petition that defendant "agreed" to carry the property to destination, did not make the action one on a contract, and the introduction of the bills of lading by the plaintiff did not convert the action into one on a contract. The bills of



lading were offered simply to show the receipt of the property by the defendant. *Heil v. Railroad*, 16 Mo. App. 363; 3 *Hutchinson on Carriers*, sec. 1335; (7) There is no variance between the proof and the allegations of the petition, but even if it should be held that there was a variance, the same was waived by the defendant and the question cannot be raised under our statutes, sections 665 and 656, after verdict. (8) The initial carrier cannot exempt itself as to interstate shipments from its common law liability by contract or otherwise, and this law is binding upon the state courts; and in this case the initial carrier is liable as to the Athens, Georgia, shipment. Sec. 20 of the Interstate Commerce Act; *Smeltzer v. Railroad*, 168 Fed. 420 and 158 Fed. 649; *Railroad v. Crenshaw*, 63 S. E. 865; *Railroad v. Grayson*, 115 S. W. 933. (9) There as no consideration for the stipulation in the bills of lading that the shipments were at "the risk of the owner and subject to delay." *Phoenix v. Railroad*, 101 Mo. App. 453; *Connelly v. Railroad*, 113 S. W. 233.

GOODE, J.—The plaintiff is a corporation engaged in the grain business in the city of St. Louis, Missouri, and defendant is a common carrier with a line of railroad extending from the city of East St. Louis, Illinois, to Nashville, Tennessee. The Nashville Warehouse & Elevator Company is a corporation engaged in handling corn and other grains in the city of Nashville, drying, storing, or doing whatever customers request to improve or preserve them. From the twenty-third to the twenty-eighth of March, inclusive, plaintiff shipped ten carloads of corn from East St. Louis over defendant's line to Nashville, Tennessee, consigned to plaintiff at destination, with a direction in the bills of lading to notify said elevator company of the arrival of the cars. Plaintiff had bought this corn on the St. Louis market, whither it had been shipped from northern points, mainly Omaha, Nebraska,

over the Chicago, Burlington & Quincy Railroad to East St. Louis, where plaintiff had it run through an elevator three times to clean it of dirt, dry and prepare it for shipment to southern markets. The corn was graded No. 4, there being three grades, two, three and four, which are based, in some measure, on whether the corn is yellow or white and the quantity of dirt mixed with it, but largely, too, on the quantity of moisture it contains. Experts testified it is possible to raise No. 4 corn to No. 3 grade and even to No. 2, by a process of drying which will take sufficient moisture out of it. Plaintiff wished to have this corn dried again in Nashville by the Nashville Elevator Company before it was sent into the southern markets—wished to have this done both to prevent the corn from spoiling before it was sold, and to raise the grade. Therefore plaintiff intended to send it to Nashville in the cars of the Chicago, Burlington & Quincy Railroad in which it had been brought to East St. Louis; intended after it had been cleaned at the elevator in East St. Louis, to reload it on those cars and send it to Nashville to the Nashville Elevator Company. When first requested, the Burlington Company refused to permit its cars to go south over defendant's line, and would not agree they might until a promise in writing had been obtained from an official of defendant guaranteeing the prompt return of the cars to the Burlington Company. An officer of plaintiff negotiated this arrangement and in the course of the negotiation informed defendant's officer with whom he dealt, the grain was to be sent to Nashville to be dried. With this information defendant accepted the cars, issued bills of lading for them to plaintiff which named plaintiff as consignee at Nashville and contained a direction to notify the elevator company on arrival of the cars. The schedule time from East St. Louis to Nashville is eighteen hours, but the usual time of transit of such freight is from two to three days. Two of the cars reached Nashville in three days, five of them in four days, one in five

days, one in eight days and one in ten days, if we accept as the true dates of arrival the dates when defendant notified the elevator company the cars had arrived. There is a terminal railroad association in Nashville which hauls over different tracks cars coming in over defendant's and other roads, and there are various tracks in the yards of said association, among them one or more tracks to the elevator of the Nashville Warehouse and Elevator Company. The custom of delivery of cars of grain intended to be handled by the Elevator Company, was for the terminal company to run them on the track leading to said elevator and leave them there to be unloaded by the Elevator Company. There is no contention of non-liability on the part of defendant based upon the theory that whatever delay in delivery occurred, was the fault of the Terminal Association, and not of defendant. In every instance the Elevator Company notified defendant to have the cars in question set on the proper track to be unloaded into the elevator on the days the defendant gave notice of the arrival of the cars; but in every instance defendant delayed doing this for a period ranging from fifteen to twenty days; that is to say, the cars were not put in reach of the Elevator Company to be unloaded into its elevator and dried, until after the middle of April, though they all arrived on days running from March 30th to April 6th. Before the Elevator Company received the corn it had germinated and rotted so as to be unfit to be dried. Moreover it had "caked," it having been shipped in sacks and on account of the heat and moisture in it had formed into a compact mass in the cars so that the time required to unload a car was from four to six hours, instead of the usual time, thirty minutes; and, of course, the cost of unloading was much heavier than usual. The corn was kept in the elevator for a period of from eighty to ninety days at heavy expense to plaintiff for handling and storage and was afterwards sold for thirty-nine cents a bushel; whereas

under prompt shipment and delivery to the Elevator Company, it would have brought from fifty to fifty-five cents a bushel. Moreover it lost in weight after it was heated in the elevator 69,120 pounds, which was more than double the normal loss in the weight of corn dried before deterioration. The petition contains seven counts, of which the first one is to recover for the loss on a car shipped March 23d, the loss demanded being for unusual diminution in weight, for excessive charges plaintiff was compelled to pay for drying the corn in consequence of its deterioration and for the diminished price received when it was sold. The second count is like the first, save that it asked damages on six cars shipped March 25th. The third count asked damages on a car shipped March 27th, the fourth and fifth asked damages on two cars shipped March 28th, and the seventh count asked damages for the expense of a journey by plaintiff's officer to Nashville to look after shipments and the efforts made to diminish the loss as much as possible. These damages were laid at \$100. The following table shows in the first column the number of cars, in the second dates of shipment, in the third dates when defendant reported to the Elevator Company the cars had arrived, in the fourth dates when the Elevator Company ordered them in—that is, set on the elevator track, and in the fifth dates when the cars were set on said track and the corn unloaded into the elevator.

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Car No.	Shipped	Arrival Reported	Ordered In	Rec'd in Elevator
34350 Exchange No. 90173	March 23	March 30	March 30	April 18
25976	March 25	March 30	March 30	April 19
29466	March 25	March 30	March 30	April 18
22906	March 25	March 30	March 30	April 18
25869	March 25	March 30	March 30	April 20
32468	March 25	March 29	March 29	April 18
28699	March 25	March 30	March 30	April 18
18689 Exchange No. 4594	March 27	April 6	April 6	April 20
43124	March 28	April 1	April 1	April 19
20848	March 28	April 1	April 1	April 19

The two instances in which the words "Exchange No." appear in the first column, refer to a change of cars, the corn having been unloaded at Nashville by defendant from the cars in which it was carried there, into other cars and the number of the latter reported to the elevator company.

On March 15th plaintiff shipped over defendant's line a carload of corn consigned to itself at Athens, Georgia, with instructions to notify the Arnold Grocery Company at that point. This car did not arrive in Athens until April 2d, though the usual time of transit was from five to six days, and when it arrived it was spoilt and had to be sold at a sacrifice. The sixth count of the petition is to recover for the damages to that corn, The first five counts which deal with the ten cars shipped to Nashville, alleged in substance, plaintiff delivered the cars to defendant at East St. Louis, and defendant received them for shipment for charges to be paid, and agreed well and safely to carry the cars from East St. Louis to Nashville "and at the latter place to deliver

the same to the Nashville Warehouse & Elevator Company in as good condition as when received from plaintiff as aforesaid, said corn shipped for drying and storing of which defendant had notice. But plaintiff says that in violation of its said agreement, and in total disregard of its duties as a common carrier as aforesaid, it so carelessly and negligently conducted itself in the premises that said property was greatly damaged in this: That by reason of the negligent and unreasonable delay in the transit of said car from East St. Louis, Illinois, to Nashville, Tennessee, and the negligent and unreasonable delay in delivering said car after its arrival at destination, the said corn became hot, and when the same was delivered, said corn was greatly damaged and reduced in value." The sixth count is substantially in the same form and deals with the Athens, Georgia, shipment. The answer set up four defenses: First a general denial; second, that the damage to all the corn mentioned in the petition, if any occurred, was due to its condition before, during and after transportation, its inherent defects, its disposition to germinate and spoil, and to the influence of the heat and moisture it was subjected to through no fault of defendant; third, that whatever damage happened was caused by the negligence of plaintiff directly contributing thereto, without alleging in what particular plaintiff was negligent; fourth, that whatever damage the corn mentioned in the first five counts of the petition sustained, happened after transportation of the corn was completed, after it was delivered at Nashville, and after prompt notice of arrival had been given and was due to plaintiff's not promptly unloading the corn after arrival and caring for it. Proceeding further to state the facts, we observe, the testimony went to prove corn shipped in the condition that in question was when it left the elevator in East St. Louis, would, under the usual weather conditions in the spring, remain sound without further handling for about eight days, perhaps ten. From March 26th to April 30th, there was a con-

gestion of cars on the tracks in the yards of the Terminal Association in Nashville and great quantities of corn and other grain spoiled in the cars on the tracks in consequence of inability to get it unloaded promptly into elevators to be dried. Grain intended by the Terminal Company to be turned into the Nashville Elevator Company's warehouse accumulated on the tracks in quantities ranging from twenty-three cars in the latter part of March, to one hundred and one cars on April 30th, which was the maximum accumulation. Immediate transfer of the cars in question to the track of the elevator company so the corn could be dried was solicited of defendant personally by the officers of the elevator company, and said officers informed defendant's officers the elevator company had promised prompt handling. When those cars began to arrive in the yards at Nashville, the elevator company's officials at once demanded of defendant and, it seems too of the Terminal Association, that these cars be put on the elevator track ahead of other cars. This demand was made both verbally and in writing and defendant was notified as follows: "This business was solicited before any heated corn arrived. We (*i. e.* the Elevator Company) reserved the right to order in ahead." Just what that expression means is not cleared up entirely by the evidence; that is to say, it is not clear whether the Elevator Company made an agreement with the plaintiff to order the cars in on the elevator track ahead of other cars, or whether it had an understanding with defendant or the Terminal Association that it might. It is proved, however, that on the arrival of the cars, the president of the Elevator Company told defendant and also the Superintendent of the Terminal Association, the Elevator Company had solicited the business on a promise the corn would be promptly dried, requested the cars to be put on the elevator track at once, and the Superintendent of Terminals promised to do everything he could to have this done. As one of the main defenses in the case

is that defendant was justified in not delivering promptly to the Elevator Company because of the great congestion in the yards, and a rule of the Terminal Association that cars of grain to be stored or dried in the elevator should be put on the elevator track in the order of their arrival, it is necessary to notice the evidence at this point more minutely. There was a general arrangement between the Nashville Elevator Company, the defendant railway company and the Nashville, Chattanooga & St. Louis Railway Company, to this effect: When cars of grain reached the Nashville yards over the lines of either company and were "not taken up by the consignee within a certain period," the grain was stored with said Elevator Company on what was called the "Railroad Account." The Elevator Company had no contract with the owner of the grain and did not know him, but if the grain was not promptly called for by the consignee, said Elevator Company would receive it from the railroad company which had brought it in, with a view to storing, drying or otherwise preserving it. The railroad companies we may say had a contract with the Elevator Company by which, without any special arrangement in each case, they might send the latter for handling and storage, cars of grain not promptly called for by the consignees. Just what was the relation in which the Terminal Association stood to defendant is not made clear; but as well as we can gather, the Terminal Association was a party to the arrangement and worked by a rule that it would set cars of grain which required attention on the elevator track in the order of their arrival in the yards. There is no proof this rule was any part of the contract between the railway companies and the elevator company, but the latter had acquiesced in it; at least never before had asked that it be disregarded. In the present case it made such a request and the Superintendent of Terminals agreed to endeavor to comply with the request by putting the cars in question ahead of other cars; and,



it seems, he did give them a certain degree of preference, but not sufficient to prevent the corn from spoiling before delivery. The evidence shows seven other cars of corn were shipped from East St. Louis at the same time those in controversy were, and by prompt delivery to the Elevator Company were prevented from spoiling. It needs further to be stated the bills of lading contain these words: "Owner's Risk; subject to delay;" also "Perishable," "Rush." The court below found as a fact no consideration in the way of a reduced rate or otherwise was allowed for the corn being carried 'at plaintiff's risk. As regards the cause of the failure of the railroad company to deliver the cars to the Elevator Company, the evidence is not altogether uniform. The testimony of defendant's yardmaster at Nashville tends to prove defendant was not at all to blame, but could have delivered the cars to the Elevator Company if said company had been prepared to receive and handle the grain, and was prevented from doing so by the accumulation of other cars of corn which had come in ahead and by the rule ought to be first taken care of by the Elevator Company. On the contrary the assistant secretary of the Elevator Company gave testimony conducing to prove defendant or the Terminal Association was not as expeditious as was possible in putting the cars on the elevator track. He said defendant sometimes put them in as fast as the Elevator Company could handle them, but there were times when the tracks were empty (meaning the elevator tracks) because the yards were congested and they (meaning defendant) could not use the switches in the terminals, that this was due to the immense number of cars in part, and also to the movement of passenger and freight trains on the main tracks of defendant company and of the Nashville, Chattanooga & St. Louis Railway Company. That is to say, the congestion of cars on the main tracks prevented the cars of grain destined to the elevator from being set on the elevator tracks, because it was necessary for the cars of

grain to go over the main tracks to reach the elevator tracks, and passenger and freight trains so obstructed the main tracks the elevator tracks could not be reached. The evidence showed without contradiction the corn in the cars was known to be rotting on the tracks before it was delivered, and if it had been promptly delivered, it would have been saved. The Elevator Company did not present bills of lading to defendant for plaintiff's cars until May 5th, but the proof is there was an arrangement between defendant and the Elevator Company by which the latter could get cars of grain without presenting bills of lading and hold the grain in the elevator subject to defendant's charges until these had been paid. The court found the issues for plaintiff on all the counts of the petition, the total judgment being for \$2682.56, of which \$41 was allowed on the seventh count for the expense plaintiff was forced to incur in looking after the corn and \$439.19, on the sixth count for the loss on the corn shipped to Athens, Georgia. The remainder of the judgment was for the difference in the price received for the corn mentioned in the first five counts and what it would have brought if undeteriorated. From this judgment the defendant appealed.

We have stated this case fully, because we think the facts fully stated show there is no merit in the errors assigned. The first assignment is, as we understand it, that in the first five counts the declaration is *ex contractu*, whereas plaintiff was allowed to recover in tort. This position is untenable. The gravamen of the petition in those five counts is in tort for negligent delay in carrying the corn and delivering it after it arrived at destination. The averment that defendant agreed well and safely to carry the corn to Nashville and deliver it there to the Elevator Company in as good condition as when received was intended as matter of inducement and to show defendant undertook with plaintiff to act as a common carrier of plaintiff's grain, thus serving as a basis for essential averments showing defendant violated

the duties imposed on it by law as a common carrier. [Heil v. Railroad, 16 Mo. App. 363; 3 Hutchinson, Carriers, sections 1333, 1351.]

The petition and proof are further questioned because the former alleges defendant agreed to deliver at Nashville to the Nashville Elevator Company and at Athens, Georgia, to the Arnold Grocery Company, whereas the bills of lading show the undertaking was to deliver to plaintiff at both places. Hence it is contended a failure of proof occurred. As we have stated, the bills of lading named plaintiff as consignee of all the cars and contained directions to notify the elevator company at Nashville and the grocery company at Athens; and whatever variance there is between the petition and proof in this regard, is only apparent and wholly immaterial. What the bills of lading meant and defendant understood them to mean, was the property should be turned over at destination to the parties to be notified, if the latter had the bills of lading showing they were the persons authorized to take charge of the shipments.

It is argued no ground for a verdict in plaintiff's favor was established because the delay in transit had nothing to do with the damage to the corn, which damage occurred after arrival at destination and in consequence of the grain having been shipped from a northern to a southern climate during the spring of the year. We do not assent to the argument made throughout defendant's brief, that the delay in transit had nothing to do with the spoiling of the corn. In view of the supposed rule at Nashville to send cars to the elevator in the order of their arrival, it may have had much to do with the damage. If the cars in question had reached destination in due time, the inference might be drawn they would have arrived sooner and have been entitled to precedence under that rule in respect of delivery on the elevator track over cars which were given the preference. Hence if we were to grant the rule afforded a

valid excuse for defendant's failure to deliver the cars promptly, it would not follow necessarily no liability on the part of defendant was shown, since it was for the trier of the fact to say whether the delay in transit caused plaintiff's cars to lose the precedence which otherwise they would have enjoyed. The proposition that the corn spoiled in consequence of a change of climate, scarcely merits attention, for all the evidence shows it would not have spoiled if it had been turned into the elevator upon arrival. The case of Hardin Grain Co. v. Railroad, 134 Mo. App. 681, 114 S. W. 1117, to which we are cited in support of this proposition, bears no resemblance to the one at bar. In said case the damage to the corn resulted from the omission of the shipper's agent at destination to unload it promptly, said agent having ignored for a month a notice given by the railroad company of the car's arrival. If the elevator company at Nashville had been so remiss, there would be merit in defendant's argument; but said company ordered the cars set on its tracks the day they arrived, and defendant held them more than two weeks while it knew the grain in them was rotting.

The main contention is, defendant should be excused because the congestion in the yards prevented an earlier delivery under the rule in force there. If this rule was one which the law would uphold defendant in adhering to under the circumstances, a question of fact would arise on the evidence in the case at bar, as to whether so many other cars of corn were entitled to precedence over plaintiff's as to prevent delivery of the latter. As we have pointed out, there was evidence conducing to prove it was not other cars of corn entitled, under the rule, to be delivered on the elevator track ahead of plaintiff's, which prevented defendant from delivering the latter, but the unusual obstruction of the tracks in the yard by freight and passenger trains belonging to defendant and another railroad company. Seven cars which were shipped with some of

these and arrived at the same time, were turned over to the Elevator Company promptly, and there is no conclusive evidence that plaintiff's could not have been delivered as promptly. But in point of law, the alleged rule is no excuse for the delay in delivery. To begin with, the testimony conclusively shows the railroad people agreed to suspend the rule and put in plaintiff's cars ahead of others that had arrived before, and did this in some measure, thereby waiving the rule. Moreover, when we get to the facts relevant just here, we find they are these: The two railroad companies whose lines ended in the Nashville yards, had an arrangement with the Elevator Company by which the railroad companies might turn into the elevator to be stored and dried, any grain that arrived in the yards and was not called for by the consignees in a reasonable time. And the railroad companies under that arrangement were in the habit of turning into the elevator such carloads of grain in the order of their arrival in the yards; had, in fact, such a system or working rule, but there is nothing to show the Elevator Company was a party to prescribing it or had agreed in its contract with defendant or any other company to be bound by it and much less had plaintiff, for plaintiff knew nothing of the rule. How such a custom or arrangement entitled defendant or the Terminal Association, to refuse to comply with the demand of the Elevator Company for an immediate delivery to the latter of grain it had agreed with the owner to dry at once, we fail to perceive, and especially do we fail to perceive how defendant could be so entitled as against plaintiff. On what theory did defendant have a right to postpone delivery of cars which were called for promptly by the consignee, in favor of cars which the consignees had delayed unreasonably to call for, simply because defendant had a contract with the Elevator Company that the latter should take charge of uncalled-for cars? Defendant was bound by law to deliver these cars in a reason-

able time, and if the consignee called for them at once, or within a reasonable time, manifestly it was no legal excuse for refusal to perform its duty to make a reasonable delivery, that there were other cars it wished to turn over to the Elevator Company first. Said company was under no contract with the owners or consignees of other cars which were awaiting delivery in the yards and had taken on itself no duty in regard to them, save the arrangement with defendant by which the grain in them might be stored in the elevator; whereas the Elevator Company had bound itself in a contract with plaintiff regarding these very cars, to clean the grain promptly, and if it chose to defend them at once, we do not see how the customary order of delivery justified a refusal to comply with the demand. As said, defendant did not refuse, but instead expedited the delivery over other cars which by the rule would have had priority. In point of law the supposed rule would have no force in this case, though insisted on as a defense. The only conclusion from the evidence about the delay in delivery is that defendant had congested its Nashville yards by receiving from outside points more grain for carriage to said city than could be handled there. Defendant knew of this condition when the cars in question were received and plaintiff did not. Moreover, defendant was expressly notified the corn was sent to Nashville to be dried and would require immediate handling to prevent it from spoiling. We do not find the least evidence to show plaintiff was to blame for the damage or to exonerate defendant. The Elevator Company did all in its power to avoid the loss, but its efforts were frustrated by defendant's failure to perform the duty to deliver the corn in a reasonable time; a failure due to no fault of the plaintiff, but either to defendant's not providing adequate terminal facilities or accepting more grain destined to Nashville than it could take care of at the time.

But it is said further defendant is to be excused because the bills of lading were not presented by the Elevator Company when the cars were ordered in. No doubt defendant might have refused to turn over any freight to the Elevator Company except on the presentation of bills of lading if it had chosen to do so; but to allow a defense for that reason in the present action would be to ignore the entire evidence, which shows that defendant and the Elevator Company had an arrangement pursuant to which grain was delivered without the tender of bills of lading; further, that defendant did not decline to turn over the cars in controversy because the bills of lading were not presented, and that they would have been presented if the delivery had been declined for non-presentation.

A point is made about lack of evidence of the value of the corn in the Nashville market; but we think there was abundant evidence on this issue.

The appeal is without merit and the judgment is affirmed. All concur.

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UNION SERVICE COMPANY, Appellant, v. MOFFET-WEST DRUG COMPANY, Respondent.

St. Louis Court of Appeals, May 3, 1910.

1. **CONTRACTS: Contract by Correspondence: Necessity of Proving Acceptance.** Where a contract is declared on as created by correspondence, the correspondence must show that the terms offered by one party were accepted by the other.
2. ———: ———: ———. Where a proposal by one party is not assented to by the other party, but instead the response contains a variation of the terms, this becomes a counter-offer, which must be accepted to form a contract; and if the answer to it departs from the terms proposed, in some respect, another offer is made.

3. ———: ———: ———: **Facts Stated.** Where plaintiff wrote to defendant offering to furnish six horses and vehicles for \$43 a month for two years, and defendant replied offering to take four vehicles as long as the price and outfits were satisfactory, to which plaintiff replied, stating it was in receipt of defendant's letter accepting plaintiff's proposition and saying "whereby we will furnish you with four storm buggies and outfits complete for a period of two years," to which letter defendant did not reply, there was no contract, because plaintiff's first offer was not accepted by defendant, but the latter submitted a counter-proposition which was not accepted; and the letters do not justify the construction that defendant agreed to accept the service of four vehicles for two years, provided the price and outfits were satisfactory.
4. ———: **Letters: Legal Effect: Question for Court.** The effect of letters alleged to constitute a contract by correspondence is for the court, and a party is not entitled to have the question of whether a contract has been formed, and, if so, on what terms, submitted to the jury.

Appeal from the St. Louis City Circuit Court.—*Hon. Jas. E. Withrow*, Judge.

**AFFIRMED.**

*N. S. Brown* for appellant.

(1) (a) The contract in this case was an agreement for a period of two years with the right reserved to the defendant to terminate the same at any time upon reasonable notice to appellant that the price and service were not satisfactory. (b) There was no termination of the contract. (c) The defendant at the time of the sale of its business to the Merrill Drug Company, and subsequently thereto, expressly recognized the contract as a binding and existing obligation upon itself for the full period of two years. (2) The contract in question could only be terminated by the defendant, before the expiration of two years, by reasonable notice to the plaintiff that the price and service were not satisfactory. *Mfg. Co. v. Mfg. Co.*, 100 Mo. 325; *Ford v. Dwer*, 148 Mo. 528; *Harley v. Sanitary Dist.*, 107 Ill. App. 546; *Mining Co. v. Humble*, 153 U.



S. 540; Lawson on Contracts (2 Ed.), sec. 417. (3)  
In view of the conflicting parol evidence of conversations between officers of plaintiff and defendant, as regards the term of the contract, plaintiff was entitled to the verdict of the jury upon that question.

*S. T. G. Smith* for respondent.

GOODE, J.—Both parties are incorporated companies, the plaintiff having succeeded to all the interests, contracts and rights of its predecessor, the St. Louis Service & Horse Company. The action is to recover damages for the refusal of defendant to comply with a contract alleged in the petition to be “embodied in certain letters, dated as follows: One September 15, 1905; two September 29, 1905, and one September 30, 1905.” It is alleged that by the contract plaintiff agreed to furnish and defendant to use and pay for four storm buggies with horses and harness, to be delivered every day for a period of two years, beginning October 15, 1905. The demand is resisted on the theory the contract was not for two years, but was terminable at defendant’s option and was terminated March 1, 1906. The court below at defendant’s request, directed a verdict for plaintiff for \$10.93, as being the amount defendant would owe if its contention were right; whereas plaintiff asked judgment for \$3400, as the amount that would have been earned if the contract was for two years and had been carried out. The averment of the petition is defendant notified plaintiff it no longer desired the latter to furnish buggies under the contract after February, 1906, but notwithstanding said notice plaintiff stood ready and willing to comply with the contract to the date of its expiration, two years from October 15, 1905. The four letters said to contain the contract are these:

"My dear Mr. West:

"Sept. 15, 1905.

"Mr. Anderson tells me that you will probably make some change in your present contract with reference to storm buggies for your salesman. As he no doubt explained to you, I have organized a company for the special purpose of supplying high class equipment for work of this kind.

"I understand you will want six complete outfits, one of which will be maintained at Wellston. I beg to quote you a rate of \$45 per calendar month for each outfit, contract to run two years from date of commencement, with the privilege of extension beyond this period at the same rate, or to reduce the number of buggies at the expiration of two years if deemed expedient. This rate contemplates that the equipment shall be delivered to the salesman at the store, or to be called for, as you may elect. It also contemplates the supplying of equipment that shall be entirely satisfactory to you. You may receive bids as low, or perhaps lower than I have quoted, but I feel quite sure that it will be difficult for any one else to furnish you with a more satisfactory service than I am able to furnish. I am familiar with the requirements of this class of work, and have in Mr. Anderson one of the most competent assistants that can be found in the city.

"If you should elect to accept this proposition, I shall require a little time in which to get the equipment together, which will all be new and strictly first-class.

"Very truly yours,

"UNION SERVICE COMPANY,

"By JOHN M. ALLEN, President."

"My dear Mr. West:

Sept. 29, 1905.

"With reference to your talk yesterday with Mr. Anderson in the matter of supplying storm buggies for your salesmen, I have decided to make you a price on the entire outfit as described in my letter of the 15th inst., for Forty-three dollars (\$43.00) per month for each and every working day in the calendar month.

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Union Service Co. v. Drug Co.

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"If you find this proposition satisfactory and will advise me to-day, I will immediately place the order for the equipment, and hope to be able to deliver the entire six buggies at your place of business for service on the 15th day of October.

"I am quoting you an exceptionally close price and propose to furnish you a class of equipment that your salesmen will be proud of.

"Sincerely yours,

"UNION SERVICE COMPANY,

"By JOHN M. ALLEN, President."

"St. Louis, Mo., Sept. 29, 1905.

"J. M. Allen, Pres. St. Louis Service & Horse Co., St. Louis, Mo.

"Dear Sir: In answer to your proposition to us under date of September 15th and 29th, beg to say that we will accept same for the equipment of four complete outfits for our salesmen's use as described in your letter for the consideration of \$43.00 per month each, and any additional outfits required by us for salesmen's use will be furnished by you at the same price.

"Three outfits to be delivered to our place of business and one to our west end salesman at or near Wellston on the morning of every working day at seven o'clock a. m.

"We will agree to employ this service from you as long as the price and outfits are satisfactory. The above outfits to be furnished to us beginning October 15th, 1905.

"Yours truly,

"MOFFET-WEST DRUG CO.,

"C. H. WEST, Secretary,"

"Sept. 30, 1905.

"Dear Sir: I am in receipt of your favor of the 29th accepting our proposition of September 15th and 29th, whereby we will furnish you with four storm buggies,

with horses and outfit complete, three to be delivered at your place of business and one to be delivered as may be directed by you later at or near Wellston, on each and every working day at 7 o'clock a. m., at a rate of \$43.00 per month each, for a period of two years, beginning October the 15th, 1905, you to have the privilege of ordering additional outfits that may be required upon reasonable notice at the same price.

"We have to-day placed our order for these outfits and will do everything we possibly can to deliver them to you on the morning of the 15th, as above indicated.

"Thanking you for the contract, and assuring you that we shall leave nothing undone to make our relations satisfactory, believe us,

"Very truly yours,

"UNION SERVICE COMPANY,

"By JOHN M. ALLEN, President."

The petition alleges the terms of the contract said to have been formed by those letters as follows:

"Plaintiff states that during the month of September, 1905, the St. Louis Service & Horse Company, a co-partnership then doing business in the city of St. Louis, entered into a certain two-years contract with defendant, whereby it was agreed that said St. Louis Service & Horse Company should furnish defendant with four (4) storm buggies with horses and outfit complete, three (3) to be delivered at the place of business of the defendant in the city of St. Louis, and the other one (1) to be delivered as defendant might direct, at or near Wellston in the city of St. Louis, on each and every working day at seven o'clock a. m., at a rate of Forty-three Dollars (\$43.00) per month each, to cover a period of two years beginning October 15, 1905; and that said contract further provided that defendant should have the privilege of ordering additional outfits upon a reasonable notice to plaintiff and at the same price, should defendant require them from time to time;

and that said contract further provided that defendant should have the privilege, if it so desired, at the expiration of said contract, to renew the same for an additional period of time, or to reduce the number of buggies if defendant so desired."

Subsequent to the correspondence plaintiff purchased six horses, six sets of harness and six new storm buggies to carry out the supposed agreement, began furnishing them to defendant October 15th and they were accepted and used until February, 1906. That is to say, four buggies and horses were, three of them being delivered each day at defendant's place of business in St. Louis and one at Wellston. During said period defendant ordered another buggy and horse and this increase of service was alleged and conceded by plaintiff to have been within the agreement. It was used for a time and then by mutual consent was dropped. In February, 1906, defendant sold its business to the Merrill Drug Company, and on learning of the fact from a newspaper, plaintiff wrote defendant saying plaintiff presumed it would be notified in due time of the assignment of the contract to the Merrill Drug Company. Defendant wrote the following letter to plaintiff:

"St. Louis, Feb. 24th, 1906.

"Mr. J. M. Allen, Pres. Union Service Company, Sixth & Cerre Sts., City.

"Dear Mr. Allen: I am in receipt of your communication of yesterday and also of this morning. Your letter of to-day reached me while Col. Walbridge was in our office. They wish to take over our contract for buggies with you, which Mr. Walbridge stated he would confirm to you to-day.

"As to furnishing Mr. Bausch with Meyer Bros. we, of course, have nothing to do with his arrangements with them. The service for buggies should be charged to Merrill Drug Company, beginning with yesterday morning, February 23rd, 1906.

"Wishing you unbounded success in all of your undertakings and with personal and highest regards from the writer,

"Very sincerely,

"MOFFET-WEST DRUG CO.,

"C. H. WEST, Secretary."

The Merrill Drug Company used three vehicles for a while, but with the declaration that it had not agreed with defendant to take over the contract with plaintiff. In the course of a few months the Merrill Drug Company cut the service to two vehicles and then to one, which it used until the expiration of the alleged contract between plaintiff and defendant. Plaintiff did not release defendant from its obligation, whatever that was, but on March 27th, wrote this letter:

"March 27th, 1906.

"Gentlemen: We have this day effected settlement with the Merrill Drug Company for their February service, they having paid us \$28.67; this for three buggies five days each and one buggy one day. You have paid us \$132.40, account of February service; total received—\$161.07; balance due \$10.93. We mailed you a balance due bill a few days ago for \$10.80.

"Kindly let us have your check so that we may close our February account, obliging,

"Yours truly,

"J. M. ALLEN."

That letter was not answered nor the demand paid. Plaintiff continued to send defendant bills for the amount of the total service called for by the contract, except the portion for which the Merrill Drug Company paid. There was contradictory testimony about what transpired between the officers of the two companies during the intervals between the first four letters, when it appears said officers negotiated in person as well as by correspondence. Defendant's officer said he told the

officer of plaintiff with whom he dealt, defendant would not take the service for any stipulated term because a previous arrangement of a similar character had proved unsatisfactory. Plaintiff's officer denied said statement was made. As the petition declares on a contract made by the four letters and containing certain averred terms, the question for decision is whether they made such a contract between the parties, and one that bound plaintiff to furnish and defendant to accept and pay for four horses and vehicles over a period of two years. It is contended for defendant no contract ever was formed, inasmuch as the letters show the minds of the officers of the two companies did not meet upon any terms; hence the service actually furnished by plaintiff was not rendered pursuant to any agreement made by the letters for a definite period of service and defendant was bound to pay for only what it accepted. This proposition is sound. The first letter written by plaintiff September 15, 1905, and the second letter also written by plaintiff under date of September 29th, submitted a proposal to furnish six horses and vehicles for \$43 a month; "the contract to run two years from date of commencement." The answer sent by defendant under date of September 29th varied the proposed terms in that defendant offered to take four vehicles instead of six, and said it would accept the services "as long as the price and outfits are satisfactory," instead of agreeing to take for two years. That response of defendant to plaintiff's offer did not accept the latter according to its terms and thus create a contract. The next day, September 30th, plaintiff replied saying it was in receipt of the letter of September 29th written by defendant, accepting plaintiff's proposition of September 15th and 29th, and saying further: "whereby we (*i. e.* plaintiff) will furnish you with four storm buggies and outfits complete . . . for a period of two years, beginning October 15, 1905." Instead of acceding to defendant's proposal to accept the service

as long as it was satisfactory in price and quality, this letter reiterated the term contained in the original proposal of plaintiff that it should continue for a period of two years. Defendant never replied to the letter of September 30th, and as said letter was not an acceptance of defendant's offer, but a variation from the terms of said offer, it is clear no contract was made by the four letters as the petition charges. The law is elementary that when a contract is declared on as having been created by a correspondence, it must appear to sustain the averment, the very terms offered by one party were accepted by the other. [Robinson v. Railroad, 75 Mo. 494; Strange v. Crowley, 91 Mo. 287; 1 Page, contracts, section 46; 1 Parsons, Contracts, \*476; Clark, Contracts, p. 24; 1 Beach, Contracts, section 51.] This essential fact never happened in the case at bar. Plaintiff's first offer as tendered in its first two letters was not accepted, but, on the other hand, a counter proposition was submitted by defendant, constituting a new offer. That offer never was accepted by plaintiff, for instead of accepting it, it renewed a term of its original offer to which defendant had signified no assent. But counsel for plaintiff argues the true construction put on the letters is that defendant agreed to accept the service of four vehicles for two years provided the price and outfits were satisfactory, and thus a binding contract was formed; that the condition on which defendant might terminate it before the end of the two years period did not occur, since it is conceded the price and quality remained satisfactory. The obstacle to the acceptance of this argument is that it contravenes the rules of law pertinent to a case where a contract is alleged to have been made by letters. As said, in such a case when a proposal by one party is not assented to by the other party, but instead the response contains a variation of the terms, this becomes a counter offer which must be accepted to form a contract, and if the answer to it departs from the terms proposed in some



respect, another offer is made; as in effect, the learned judge below ruled. [Cangas v. Mfg. Co., 37 Mo. App. 297; Batavia v. Railroad, 126 Mo. App. 13, 103 S. W. 140, and authorities cited in opinion.] The legal effect of the four letters was a matter to be determined by the court and plaintiff was not entitled to have the question of whether a contract had been formed and, if so, upon what terms, left to the jury, inasmuch as the letters alone and no matters of conduct resting in parol were alleged to have created the contract. [Eagle Mill Co. v. Caven, 76 Mo. App. 458, 462.] We find nothing in the correspondence which fairly construed shows defendant ever bound itself for two years or plaintiff ever agreed it might terminate the service sooner on any condition. Furthermore, it is to be observed the terms of the contract as alleged in the petition do not coincide with the terms stated in plaintiff's last letter of September 30th, wherein plaintiff set out the terms as it understood them. The petition alleges the contract provided defendant should have the privilege of renewing the contract at the expiration of two years if it desired to do so, and the privilege of reducing the number of buggies when it desired. Neither of those terms is expressed in the letter of September 30th, and we do not find them in either of the letters except the one of September 15th, which, as said, was rejected, in effect, by defendant's counter proposal of September 29th. It results the contract declared on was not formed by the correspondence, even if some contract was; and, as already stated, in our judgment none was formed.

If the parties made a contract and their minds definitely met on a two-years term, as there is much in the conduct of defendant and the letters written by it after it had sold its business to the Merrill Drug Company to prove, this contract and its terms are to be gathered from the entire correspondence and conduct of the parties, including an implied acceptance to be inferred

from defendant's conduct and letters subsequent to September 30th. As to this matter we do not decide, because the petition seeks relief on an agreement alleged to have been made by the earlier correspondence.

We can perceive no reason why the court should have instructed, at defendant's request, for a verdict in plaintiff's favor for \$10.93, as the amount due for service from the date February 22d, when defendant gave notice it would no longer need the service, to March first. If defendant was not bound for two years, it looks like it might cease accepting when it chose, and was no more bound by the letters until March first than to February twenty-second. The judgment for said sum possibly might prejudice plaintiff in another action; but as it was in plaintiff's favor, carried the costs and perhaps is preferred as it stands, we do not feel at liberty to enter a modified judgment until a suggestion is made by plaintiff and defendant notified.

Judgment affirmed. All concur.

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MARY E. WHITE, Appellant, v. LUCY A. McFARLAND, Executrix, Respondent.

St. Louis Court of Appeals, May 3, 1910.

1. **JUDGMENTS: Default: Irregularities: Setting Aside.** Where an action of replevin is against an executrix in her representative capacity, a default judgment for the value of the property, rendered against her personally, is irregular, if not void, and may be set aside on application therefor within the statutory period.
2. **EXECUTORS AND ADMINISTRATORS: Detaining Property: Personally Liable, When.** An executor or administrator is personally responsible for property he detains from a claimant as an asset of the estate of the deceased, with knowledge that it did not belong to decedent, but to claimant.
3. **———: Replevin: Detaining Property.** It has never been pointedly held in this State that under no circumstances will replevin lie against an administrator, and as circumstances

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may occur where it should lie, the court inclines to the view it will lie when such conditions obtain.

4. ———: ———: ———: Detinue. The remedy of replevin has largely displaced the old remedy by detinue, and the latter remedy would lie against an executor or administrator, if the property had been detained by his decedent and had passed into his hands upon the latter's death.
5. **JUDGMENTS: Default: Relief Granted Limited by Petition.** Where a defendant defaults, the relief granted against him may not be greater than that demanded in the petition; and where a defendant fails to answer a petition against him in a representative capacity a personal judgment may not be rendered against him.
6. **PLEADING: Petition: Construction.** The intendments of a petition must be taken most strongly against plaintiff, especially where a default has occurred.
7. **EXECUTORS AND ADMINISTRATORS: Action Against, in Representative Capacity: Pleading: Petition Construed.** A petition in replevin which described defendant as executrix, and which alleged the death of decedent, the granting of letters testamentary to defendant, and her qualifying as executrix and acting as such, and which alleged plaintiff's ownership of the property in controversy and defendant's refusal to surrender the same on demand, when considered in connection with the summons directed against defendant as executrix, stated a cause of action against defendant as executrix, and not an action against her individually.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. C. Hitchcock*, Judge.

**AFFIRMED.**

*H. A. & C. R. Hamilton* for appellant.

(1) The proper judgment in replevin, where defendant has the property in his possession, is that defendant return the property or pay the assessed value at the election of plaintiff. R. S. Mo. 1899, sec. 4476; *Gulath v. Waldstein*, 7 Mo. App. 66; *Bank v. Thompson*, 54 Kan. 307; 3 Blackstone Commentaries (Lewis Ed.), p. 153; 2 Chitty on Prac., p. 623; *Cobbey on Replevin*, sec. 1105; *Shinn on Replevin*, sec. 661b; 17

Ency. of Pl. and Pr., p. 591. (2) Where a petition states a cause of action against a defendant, showing individual liability, the addition of the words executor, etc., will be considered *descriptio personae* and disregarded as surplusage. 21 Ency. of Pl. and Pr., pp. 294, 295; Johnson v. Gaines, 8 Ala. 791; Litchfield v. Flint, 104 N. Y. 543; Stillwell v. Carpenter, 62 N. Y. 639; Bank v. Shuler, 153 N. Y. 163; Andres v. Kridder, 47 Neb. 585; Thomas v. Carson, 46 Neb. 258; State to use v. Matson, 38 Mo. 489; Lavorty v. Woodward, 16 Iowa 1; Braden v. Hollingsworth, 8 Humph. (Tenn.) 19; Hood v. Link, 2 B. Mon. (Ky.) 37; Melone v. Davis, 67 Cal. 279; Munch v. Williamson, 24 Cal. 167; 18 Cyc., p. 881, 882; Waldsmith v. Waldsmith, 2 Ohio 333; Millenberger v. Schlegel, 7 Pa. St. 241; Agee v. Williams, 27 Ala. 644; Bragdon v. Harmon, 69 Me. 29; Stillwell v. Carpenter, 2 Abb. N. C. 238; Rider v. Duval, 28 Texas 622; Fitzhugh v. Fitzhugh, 11 Gratt. (Va.) 300; Genet v. DeGraaf, 27 App. Div. N. Y. (1898) 238; Higgins v. Halligan, 46 Ill. 173; Railroad v. Long, 160 Ind. 564; Shepard v. Creamer, 160 Mass. 496; Jerkowski v. Marco, 56 S. C. 241. (3) If an executor or administrator, as such, receives money or takes possession of property to which the estate has no right, he is personally liable in an action by the real owner for its recovery. Am. and Eng. Ency. of Law (2 Ed.), p. 943; Davis v. Krum, 12 Mo. App. 279; Braden v. Hollingsworth, 8 Humph. (Tenn.) 19; Hood v. Link, 2 B. Mon. (Ky.) 37; Waldsmith v. Waldsmith, 2 Ohio 333; Elmore v. Elmore, 58 S. C. 289; McCustian v. Ramey, 33 Ark. 142; Rose v. Cash, 58 Ind. 278; Daily's Adm. v. Daily, 66 Ala. 266; Smith v. Jefferies, 16 So. Rep. 377; Herd v. Herd, 71 Iowa 497; Newsum v. Newsum, 19 Am. Dec. 739; Clayton v. Boyce, 62 Miss. 390; Thompson v. White, 45 Me. 445; Johnson v. McCain, 188 Pa. St. Rep. 513; Heydenfeldt v. Jacobs, 107 Cal. 373.

*P. H. Cullen, Thomas T. Fauntleroy and Shepard Barclay for respondent.*

(1) The execution is at least irregular, if not void, because it runs against defendant personally (whose individual property was levied upon and advertised for sale). The suit is against the estate of which defendant is executrix; and no execution can properly issue; but the demand should be certified to the probate court for classification. R. S. 1899, secs. 3177, 191-2, 208-10. (2) Such an execution should be quashed on motion as irregular. *Wernecke v. Wood*, 58 Mo. 352; *Brown v. Woody*, 64 Mo. 547; *Hinkle v. Kerr*, 148 Mo. 43; 1 *McQuillin*, Pract., sec. 1056. It is the right and duty of the court to control its process so as not to permit an injustice to be done thereby, and especially where the writ (as here) is against positive commands of the statute (sec. 3177). *Bryant v. Russell*, 127 Mo. 422; *Collier v. Lead Co.*, 208 Mo. 246. (3) If the judgment is to be interpreted as one against defendant individually, then it is irregular because the suit is against defendant only as executrix as the caption and recitals in the petition both prove; and a personal judgment in such case is irregular. *Laughlin v. McDonald*, 1 Mo. 684; *Ranney v. Thomas*, 45 Mo. 111; *Yarrington v. Robinson*, 141 Mass. 450; *Boyce Ex. v. Grundy*, 9 Pet. 287; *Smith v. Chapman*, 93 U. S. 41. (4) The execution is in favor of an alleged assignee and the abstract of record here shows no assignment of the judgment. The execution does not conform to the judgment and is hence irregular. Only the assignee is entitled to assert the rights conferred by the judgment. R. S. 1899, secs. 3745-8. (5) The execution is in the alternative for the property in suit "or, at the election of plaintiff" for the value thereof. The latter collection was the object of the levy checked by these motions. The execution in that form was irregular and in excess of the prayer of the petition. (6) The judgment on which the exe-

cution was based is irregular and hence it may be set aside after the term of its entry, within three years from its date. It is neither fish, flesh nor fowl. It is irregular and void for uncertainty. R. S. 1899, sec. 795. (7) The relief granted by the judgment is in excess of that prayed, which is irregular in a judgment by default. No other remedy than that first prayed is permissible. R. S. 1899, sec. 776; *Heins v. Wicke*, 102 Iowa 296; *Trust Co. v. College*, 68 Minn. 112; *Showles v. Freeman*, 81 Mo. 540; *Lawther v. Agee*, 34 Mo. 372; *Downing v. Still*, 43 Mo. 317; 3 *Chitty Pr.*, 509; 1 *McQuillin Pr.*, sec. 888; *Gamache v. Prevost*, 71 Mo. 84; *Lawther v. Agee*, 34 Mo. 372; *Stacker v. Court*, 25 Mo. 401; *Branstetter v. Rives*, 34 Mo. 318; *Stewart v. Stringer*, 41 Mo. 400; *Harkness v. Green*, 36 Mo. 47; *Kelly v. Hogan*, 16 Mo. 215. (8) The defendant is sued as executrix and is in charge of an estate as recited in the petition. The writ so runs; yet the return is upon her personally and not as executrix. This is fatally deficient and irregular. 8 *Ency. Pl. and Pr.*, pp. 669, 687, and cases cited. (9) In Missouri returns are strictly construed, and not enlarged by construction. *Spencer v. Medder*, 5 Mo. 458. (10) The petition does not state a cause of action, and will not support a judgment. It alleges no facts to show title in plaintiff. The allegation that plaintiff is "owner of and lawfully entitled to possession" of the specific property is only a legal conclusion. That formula (or rather one of the two allegations) is permitted in the statutory affidavit for summary delivery (R. S. 1899, sec. 4463) to accompany or supplement a petition; but does not supply any wants therein. As a statutory statement, the petition is fatally deficient in omitting part of the requirements, both the "fourth" and "fifth" thereof being wholly omitted. R. S. 1899, sec. 4463; *Gist v. Loring*, 60 Mo. 487. The action is maintainable without the statutory affidavit. *Eads v. Stephens*, 63 Mo. 92. But in that event, facts to establish title in plaintiff

are necessary; not legal conclusions alone. *Curtis v. Cutler*, 7 Neb. 315; *Benedict Co. v. Jones*, 60 Mo. App. 222. (11) The extent and nature of title claimed by plaintiff must be stated in such an action. *Benedict Co. v. Jones*, 60 Mo. App. 219; *Deyerle v. Hunt*, 50 Mo. App. 541; *Kern v. Wilson*, 73 Iowa 490. (12) When the petition states no cause of action, that objection may be considered first on appeal. *Lilly v. Menke*, 126 Mo. 190. (13) Where there is a general allegation of ownership and right to possession in plaintiff, and also in the petition a more particular statement that the notes are in possession of defendant and were endorsed in blank by the payee, the more particular statement controls and limits said general language, according to uniform rules of interpretation, and shows no cause of action in plaintiff here. *Reynolds v. Copeland*, 71 Ind. 422; *Haven v. Seeley*, 59 Cal. 495; *Politowitz v. Tel. Co.*, 115 Mo. App. 57; *Chitty v. Railroad*, 148 Mo. 64. (14) Possession of a promissory note endorsed by the payee is prima-facie evidence of title thereto in the possessor (in this case the defendant). The allegations in the petition on this point show affirmatively title in defendant, and no additional facts whereon to base any claim of title by plaintiff thereto. *Mason v. Bank*, 16 Mo. App. 277; *Cloud v. News Co.*, 23 Mo. App. 319. (15) A default admits only facts well pleaded, and the Statute of Jeofails or amendments is not applicable to a judgment without answer or appearance by defendant. *Neidenberger v. Campbell*, 11 Mo. 361. The judgment and execution are fatally uncertain, because no election (as mentioned therein) ever was made by plaintiff. *Adams v. Champion*, 31 Mich. 233.

GOODE, J.—Plaintiff Mary E. Wright brought an action of replevin to the October term, 1907, of the circuit court of the city of St. Louis, against Lucy A. McFarland, describing the defendant in the caption of the case as Lucy A. McFarland, executrix of Charles W.

McFarland, deceased. The opening allegation of the petition is as follows:

"Plaintiff states that on or about the first day of April, 1907, Charles W. McFarland departed this life, and that thereafter, to-wit, on the 22d day of April, 1907, letters testamentary were duly granted to Lucy A. McFarland, the defendant, by the probate court of the city of St. Louis, Missouri, and that thereupon defendant duly qualified as executrix and is now acting as such."

After making that averment plaintiff proceeded to state she was the owner of and lawfully entitled to the possession of certain personal property, to-wit, seven promissory notes all signed by James Sexton, dated September 14, 1906, payable to William Dwyer, one for seventeen hundred dollars, due three years after date and bearing interest at the rate of eight per cent after maturity, and six for fifty-one dollars each, representing the interest on the principal note and falling due every six months after date; that said notes are endorsed in blank by the payee, William Dwyer. The petition further alleged plaintiff was the owner of a deed of trust of the same date as the notes, executed by said Sexton and conveying lots in the city of St. Louis to the trustee, William Dwyer, to secure the notes; alleged said notes and deed of trust were of the value of \$2006; that they had been demanded of defendant; that defendant wrongfully detained them from plaintiff to the latter's damage in the sum of one hundred dollars; wherefore plaintiff demanded judgment against defendant for the recovery of said property and one hundred dollars damages for the detention. On the filing of said petition a summons was issued from the office of the clerk of the circuit court, directed to the sheriff of the city of St. Louis, commanding him to summon Lucy A. McFarland, executrix of Charles W. McFarland, deceased, to appear before the judge of the circuit court on the first day of the next term, to be held



in the courthouse in the said city on the first day of October, 1907, then and there to answer the complaint of Mary E. White as set forth in the annexed petition. The writ of summons was returned by the sheriff as having been served by delivering a copy and a copy of the petition as furnished by the clerk to Lucy A. McFarland, "defendant herein." The defendant not having answered or filed any other pleading within the first three days of the October term, 1907, but having made default, an interlocutory judgment was entered against her and it was ordered by the court the petition be taken as confessed and an inquiry be had. Afterwards at the December term, 1907, defendant still remaining in default, the interlocutory judgment was made final. The entry of the final judgment recited the cause had come on for a hearing and the plaintiff had appeared by attorney, but defendant had come not; the cause was submitted to the court on the pleadings and evidence and the court being fully advised in the premises "did find that at the time of the institution of this suit and at the present time, the plaintiff was and is the lawful owner and entitled to the possession of the personal property described in plaintiff's petition and that the value of said property was and is twenty hundred and six (\$2006) dollars. It is therefore considered and adjudged by the court that plaintiff do have and recover of the defendant, Lucy A. McFarland, the possession of the following personal property" (describing the notes and deed of trust); "or, at the election of plaintiff, she have and recover of the defendant, Lucy A. McFarland, the sum of twenty hundred and six (\$2006) dollars, the value of said property as found by the court, together with her costs and charges herein expended and that execution against defendant, Lucy A. McFarland, issue therefor." On December 26, 1908, and during the December term, an execution was issued on the judgment in the name of Mary E. White as plaintiff, to the use of the Oxymer Realty Company, a corpora-

tion, as assignee. This execution recited the judgment for the recovery by plaintiff of the property in controversy, describing the same, that plaintiff have and recover from defendant Lucy A. McFarland, said property, or at her election, the sum of \$2006, the value of the property as found by the court and her costs and charges in that behalf expended, which were adjudged for plaintiff, as appears of record. The execution concluded by commanding the sheriff as follows:

"That without delay you cause to be delivered to the said plaintiff the possession of said personal property, or at the election of plaintiff the value thereof, and that of the goods and chattels and real estate of the said Lucy A. McFarland, you cause to be made the aforesaid sums and costs, that you have the same before the judge of said court on the first Monday of February, next, to render to the said plaintiff the sums and costs aforesaid, and that you certify to said judge how you execute this writ, and have you then and there this writ."

The execution was duly attested by the official signature of the clerk of the circuit court and the seal of the court. After receiving the writ the sheriff, July 7, 1909, levied the same on certain real estate belonging to Lucy A. McFarland in person and advertised it for sale. Afterwards, on July 22, 1909, at the December term, 1908, of the court, Lucy A. McFarland appeared and moved the court to recall and quash the execution, levy and proceedings therein, because they were irregular and not in conformity to law, assigning various reasons; among others, these: The execution was directed against her personally and her property, whereas the action was against her only as the executrix of Charles W. McFarland; the court had no jurisdiction to render the personal judgment on which the execution was issued; the execution was irregular because it sought to enforce relief in excess of what the petition prayed; was irregular because the claim was one of

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probate jurisdiction and should have been certified to the probate court. On the same day, January 22, 1909, defendant Lucy A. McFarland, as executrix of Charles W. McFarland, deceased, appeared by her attorney and moved the court to set aside for irregularity the default and judgment rendered in the cause, assigning substantially the same grounds assigned in her motion to recall and quash the execution. Evidence was heard on the motions, but we find none which we deem necessary to state. The court took the two motions under advisement and afterwards, January 30th, during the December term, 1908, continued them to the February term, 1909, at which term both motions were sustained and judgment entered quashing the execution and setting aside the judgment which had been entered in the case December 23, 1907. Plaintiff appealed.

The reason assigned by the court below for quashing the execution and setting aside the judgment, was that the entire record in the cause showed the action had been instituted against Lucy A. McFarland, not in her individual capacity, but as executrix of Charles W. McFarland, deceased, and hence the judgment against her personally for the value of the notes and deed of trust sought to be replevied was void. It will suffice to sustain the ruling if the judgment following the default was irregular, the application for relief having been made within the statutory period. Unquestionably the judgment was irregular, and perhaps void, if the action was against defendant in her representative and not her individual capacity; for if it was against her as executrix, no judgment for the value of the property should have been rendered against her personally and to be satisfied out of her personal assets instead of the assets of the estate she represented. [Laughlin v. McDonald, 2 Mo. 684; Ranney, Admr., v. Thomas, 45 Mo. 111.] The contention of counsel for plaintiff is that notwithstanding defendant was described as executrix in the caption of the

petition, and the petition commenced with an averment of the death of McFarland, the grant of letters testamentary on his estate to defendant and that she had qualified as executrix and was acting as such, and notwithstanding, too, in the writ of summons the order was to summon her as executrix, the action is to be regarded as brought against her individually and all the allegations pointing to representative capacity rejected as surplusage or treated as descriptive matter meant to identify the person sued. The argument is that an action of replevin, or any other action in tort, will not lie against a personal representative of an estate, executor, executrix or administrator, because if the personal representative detains property as being assets of the estate against the demand of some person to whom it really belongs, the unlawful detention is the tort of the executor or executrix for which the liability is personal and not in an administrative capacity. Likely this position is not always true, though many remarks can be found in cases and text-books which lend countenance to it. No doubt an executor or administrator is personally responsible for the property he detains from a claimant as an asset of the estate with knowledge that it did not belong to his decedent, but to the claimant. But this case might be an illustration of the fact that rank injustice would result if the rule be given an arbitrary application under all circumstances. Suppose the decedent Charles W. McFarland had died with the notes and deed of trust in question in his possession and with the endorsement of the payee in blank on the notes, thereby indicating *prima facie* they were his property, and under those conditions defendant inventoried and held them as assets, and believing in good faith they were assets, she refused to turn them over to plaintiff on demand and was sued in replevin; then, even if she had answered in the case, inasmuch as the property remained in her possession at the time of the judgment, under the statute the judgment would

have to be either for the return of the property to plaintiff or the recovery of its value *at the election of plaintiff*. [Gulath v. Waldstein, 7 Mo. App. 66; Morris v. Williams, 131 Mo. App. 371, 111 S. W. 671; R. S. 1899, sec. 4476.] On the theory advanced by counsel a judgment for plaintiff would go against defendant individually for the entire value of the property, though she had been resisting plaintiff's demand in the honest belief the notes belonged to the estate. The Supreme Court has held if an administrator sues in replevin and is defeated and the property has been turned over to him, a judgment for its value in favor of the defendant should be rendered against him as administrator, *de bonis testatoris*, not *de bonis propriis*. [Ranney v. Thomas, *supra*; State to use v. Farrar, 77 Mo. 175.] Those decisions are not in point, but are cited as a basis for the remark that it would be as unjust to lay a defendant administrator liable for the value of replevied property if he honestly inventoried and detained it without reason to believe it was not assets, as to hold a bona fide plaintiff administrator liable. It never has been pointedly decided in this State that under no circumstance will the remedy of replevin lie against an administrator, and as circumstances may occur where it should lie, we incline to think it then will lie, and authority to support the proposition is not lacking. The remedy of replevin has largely displaced the old remedy by detinue, and that detinue would lie against an executor or administrator if the property had been detained by his decedent and had passed into his hands upon the death of the decedent, has been determined on great consideration. The question was gone over in a very learned opinion rendered by the Supreme Court of Virginia in Catletts' Excr. v. Russell, 6 Leigh 344. See also Alexander, Excr., v. Harlan's Admr., Id. 42; Brewer v. Strong's Excr., 10 Ala. 961; Easley, Adm., v. Boyd, 12 Ala. 684. We do not think the Legislature ever contemplated the contingency of an executor or

administrator being laid liable personally for the value of property he had detained when he received it in good faith from the decedent and in good faith held it as an asset of the estate. In *McDermott v. Doyle*, 17 Mo. 363, it was held detinue would not lie against an administrator and cases were cited to that effect. But in *Kingsbury v. Lane's Admr.*, 21 Mo. 115, the *dicta* in that opinion were discarded and it was said "the question (*i. e.*, the point decided) was as to the continuance of an action of detinue against the administrator of a deceased defendant, when the damages to be recovered for the detention may come down to the time of the verdict, and so embrace damages for which the administrator alone was personally liable; and the decision proceeds upon that ground." In the case last cited the court assumed for the sake of argument replevin would not lie against an executor or administrator, but expressly declined to decide it would not. The reasoning of the opinion is instructive; for Judge LEONARD said in effect the only assignable reason why replevin could not be instituted against a wrongdoer's administrator, was because if the property was detained after the death of the decedent the detention was a mere individual wrong on the part of the administrator for which he was personally liable; and we may observe the rule against such an action should be extended no further than the reason of the rule reaches. It should not be extended so far as to make an innocent detention by an administrator cause for giving judgment against him for the full value of the property. In that case the real question was whether an action of replevin brought against a party in his lifetime survived against his administrator. The contention that it did not survive was based on a statute regulating the survival of actions and continuing after the death of the original party only such as might be brought as original actions against an executor or administrator. It would seem in view of the language of the statute a replevin

action against a party who died after it was commenced, would not survive unless it could have been brought against his executor or administrator. However the court did not put the decision on this ground, but rather on the ground that, if it was granted, the action would not lie as an original one against the administrator. The reason of this rule was not applicable to a case where it was sought to continue such an action against an administrator, if it was commenced against his decedent. Gleaning from that opinion and the opinions in other cases we have cited their essential spirit, and having in mind our statute and the form of judgment prescribed in replevin when the defendant remains in possession of the property, we are not satisfied with the argument based on the assumption that replevin never will lie against an executor or administrator as such. The case of *Rose v. Cash*, 58 Ind. 278, implies that such an action will lie, for it states that the administrator may defend against in a personal action in replevin by proving he secured the property as administrator and it belonged to the estate.

The question we are directly concerned with and must decide is not whether this action will lie against the defendant in her representative capacity, but whether it was brought against her in that capacity; and we are discussing the former proposition simply as throwing light on the meaning of the petition and because counsel for plaintiff insist that under the cases they cite, the petition should be regarded as proceeding against defendant personally, since, as they argue, she could not be proceeded against as executrix. The petition contains no allegations that the property in question had been detained by the testator McFarland and had passed from his hands into defendant's hands at his death. If that allegation had been made the intention would have been palpable to declare against defendant as executrix. But without it, this intention breathes from the averments. No one would say the petition

would be fatally defective after judgment against defendant as executrix for stating no case against her as executrix, if such a case and judgment are permitted by the law; for clearly the averments would suffice to charge her as executrix. Nor do we think the petition would be bad on demurrer as not containing averments sufficient to charge her as a representative of the testator, granting she might thus be sued. We are not saying plaintiff could not have amended if defendant had appeared. What we are called upon to decide is what relief could be granted upon a default, and it is elementary law that no relief can be granted against the defendant other or greater than that asked by the petition; and if defendant failed to answer a petition against her in a representative capacity, no personal judgment could be rendered on such a petition. [8 Ency. Pl. and Pr., 686.] The theory underlying this strictness of rule is that the reasonable inference is the defendant in default is willing to have the plaintiff granted the relief his petition asked, but no intendment can be indulged that he is willing for other relief to be granted. We have found no case which considered the question of whether a person sued as a representative and failing to answer can be subjected to a judgment against him personally. Various cases have been cited to the effect that in actions of tort brought against parties who were described as executors or administrators and who answered, the words descriptive of the capacity could be treated as surplusage or as intended to identify the party sued, and a personal judgment rendered against him. [Hood, Admr., v. Link, 2 B. Mon. (Ky.) 37; Musselman v. Commonwealth, 7 Pa. St. 240; Litchfield v. Flint, 104 N. Y. 543; Rose v. Cash, 58 Ind. 278; Daily's Admr. v. Daily, 66 Ala. 266.] What was held in those cases was that the action would not fail against the defendants individually because of the descriptive matter, but none of them decided it would be rejected as surplusage or taken merely to



identify the defendant, in the event of a default. The petition in none of them, we believe, contained allegations which so pointedly expressed a purpose to sue the defendant as a representative and not personally, as do the allegations in the petition at bar, which sets out the death of McFarland, its date, the grant of letters testamentary to defendant and that she had qualified as executrix and was acting as such. The intendments of the petition are to be taken most strongly against the plaintiff, and particularly is this true where a default has occurred. We agree with the court below the petition in this case should be construed to state a cause of action against defendant as executrix of her deceased testator, not against her individually, and hold the judgment was rightly set aside.

The judgment of the court below setting it aside is affirmed. All concur.

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MERCANTILE TRUST COMPANY, Respondent, v.  
WILLIAM R. LAMAR, Appellant.

St. Louis Court of Appeals, May 3, 1910.

1. **REAL ESTATE BROKERS: Contract of Employment: Construction.** A contract employing a broker to procure a purchaser, which stipulates that, if a sale or exchange of the property is made while in charge of the broker, the owner will pay for his services a commission on the price, and which gives the owner the right to terminate the agency on thirty days' notice, does not reserve to the owner the right to himself sell the property during the agency without paying a commission.
2. ———: ———: **Bilateral Agreement.** Where the contract employing a broker to procure a purchaser was not signed by the broker, but he acted under it and advertised the property, the agreement was bilateral.
3. ———: ———: **Construction.** A contract employing a broker to procure a purchaser, which stipulates that, if a sale or ex-

change is made while the property is in charge of the broker, the owner will pay for his services a commission on the price, and which reserves to the owner the right to terminate the agency on thirty days' notice, binds the owner to pay the commission where he sells the property during the agency, but does not bind him to make a sale during the agency unless a buyer is found by the broker; so that where, before the termination of the agency, the owner contracted to sell, but deferred the execution of the deed until after the termination of the agency, he was liable for the commission, and, where he refused to agree to sell until after the termination of the agency, he was not liable for a commission on a sale subsequently made.

4. ———: Right of Recovery: Conflicting Evidence: Peremptory Instruction for Plaintiff Held Erroneous. In an action by a broker for commission due on a contract stipulating for a commission on a sale or exchange made while the property is in charge of the broker, evidence held to require submission to the jury of the issue whether the owner contracted to sell during the agency, but deferred the execution of the deed until after the termination of the agency, which would authorize a recovery for plaintiff, or whether the owner refused to agree to sell until after the termination of the agency, thereby relieving himself from liability for commission on a sale subsequently made, and the giving of a peremptory instruction to find for plaintiff was, therefore, error.
5. TRIAL PRACTICE: Conflicting Evidence: Question for Jury. Where there is a substantial testimony on both sides of an issue, the jury must pass on the credibility of the evidence as a whole.

Appeal from St. Louis City Circuit Court.—*Hon. Moses N. Sule*, Judge.

REVERSED AND REMANDED.

*Joseph A. Wright* for appellant.

(1) An exclusive agency does not deprive the owner of the right to find a purchaser or obligate him to pay a commission, if he sells his own property without the aid of the broker. *Packing Co. v. Farmer's Union*, 55 Cal. 606; *Waterman v. Boltinghouse*, 82 Cal. 659; *Moses v. Bierling*, 31 N. Y. 462; *Schoenmann v. Whitt*, 136 Wis. 332; *Stensgaard v. Smith*, 43 Minn. 11.

(2) In its inception the appointment was a *nudum pactum*, because respondent did not agree to do anything; and taking the view most favorable to respondent, the offer could only be accepted by using ordinary diligence to sell the property, with the burden of producing such proof, and with the question of having exercised proper diligence for the jury. However, construing the appointment in the light of circumstances, the advertising was wholly voluntary, and cannot be made a basis for a consideration. *Schoenmann v. Whitt*, 136 Wis. 332; *Stensgaard v. Smith*, 43 Minn. 11; *Santaella & Co. v. Lange Co.*, 155 Fed. 719; *Transportation Co. v. Bolt and Nut Co.*, 114 Fed. 77. (3) Respondent in its printed form of appointment chose to make the obligation to pay commissions depend upon this condition, "If a sale or exchange of said property is made while in charge of said company." Appellant made no sale until June 1, 1908, more than thirty days after notice of withdrawal, and after property had ceased to be in its charge. *Close v. Browne*, 230 Ill. 228, 13 L. R. A. (N. S.) 634; *Five Per Cent Cases*, 110 U. S. 471; *Fleet v. Hertz*, 201 Ill. 594; *Ide v. Leiser*, 10 Mont. 5; *Evans v. Green*, 23 Miss. 294; *Creveling v. Wood*, 95 Pa. 152; *Baptist Church v. Wood*, 46 N. Y. 131. (4) Respondent's printed form requires "a sale," and makes no use of any terms or words suggesting an agreement of sale or an executory contract of sale, and does not even use the verb sell. The distinction is well founded in law, and should be applied in this case. 1 *Mechem on Sales*, par. 5; *Close v. Browne*, 230 Ill. 228, 13 L. R. A. (N. S.) 634; 9 *Cyc.* 590; *Millhiser v. Erdman*, 98 N. C. 292; *Goodwin v. Kerr*, 80 Mo. 276; *Five Per Cent Cases*, 110 U. S. 471; *Strong, Deemer & Co. v. Dinniny*, 175 Pa. 586.

*Karl M. Vetsburg* for respondent.

(1) Under the contract in this case the agent is entitled to a commission on a sale of the property made by the owner himself without the aid of the agent. *Metcalf v. Kent*, 104 Iowa 487; *Chapin v. Bridges*, 116 Mass. 105; *Cook v. Blake*, 98 Mich. 289; *Goward v. Waters*, 98 Mass. 596; *Lapham v. Flint*, 86 Minn. 376; *Kimmell v. Skelly*, 130 Cal. 555; *Gregory v. Bonney*, 135 Cal. 589; *Crane v. McCormick*, 95 Cal. 176; *Singleton v. O'Blenis*, 125 Ind. 151; *Fairchild v. Rogers*, 32 Minn. 269; *Harrell v. Zimpleman*, 66 Tex. 292; *Stringfellow v. Powers*, 23 S. W. 313, 19 L. R. A. (N. S.), note p. 599; 19 Cyc. 264. (2) The authority in this case was an offer looking to the formation of a unilateral contract by the performance of certain services specifically provided for therein. On the performance thereof it became a power coupled with an interest and was no longer revocable at will. *McRay v. Pfost*, 118 Mo. App. 672. And the performance of the services specified makes a binding contract and furnishes a valuable consideration for the payment of commissions when a sale is made either through the efforts of the agent or by the owner himself. Cases cited under point 1. (3) A deed or transfer not being a constituent element of a sale. *Rice v. Mayo*, 1907 Mass. 550; *Donohue v. Flanagan*, 28 N. Y. S. R. 757; *Eaton v. Richari*, 83 Cal. 185; *Watson v. Brooks*, 8 Sawyer (U. S.) 316; *Sanderson v. Wellford*, 116 S. W. 382; *Southwick v. Swavienski*, 99 N. Y. S. 1079. Under any theory of the evidence, the sale was made prior to the expiration of the notice of withdrawal, though this fact is not essential to plaintiff's right to recover in this case. *Goodson v. Embleton*, 106 Mo. App. 77; *Desmond v. Stebbins*, 140 Mass. 339; *Pope v. Caddell*, 102 S. W. 327; 9 Current Law, 414 (note 88), 419; *Brown v. Gilpin*, 90 Pac. 267; *Gibbins v. Sherwin*, 28 Neb. 146; *Hugill v. Weekley*, 61 S. E. 360. (4) The owner cannot, by refusing to com-

plete the sale, defeat the agent of his commissions. In such an event, the law treats the sale as made in so far as the matter of commissions is concerned. *Goodson v. Embleton*, 106 Mo. App. 77; *Sallee v. McMurry*, 113 Mo. App. 253; *Watson v. Brooks*, 8 Sawyer (U. S.) 316; *Wells v. Andreas*, 115 N. W. 462; *Branch v. Moore*, 84 Ark. 462; *Canadian Imp Co. v. Cooper*, 161 Fed. 279; *Hugill v. Weekley*, 61 S. E. 360; *Sibbald v. Iron Co.*, 83 N. Y. 384.

GOODE, J.—By an instrument signed by defendant and dated February 1, 1907, he appointed plaintiff exclusive agent to sell a house and lot, to-wit, a part of lot 2, block 4847 in the city of St. Louis, stating the lowest price he would accept was \$6750. The instrument contained this clause:

“In consideration of the Mercantile Trust Company advertising the property, and their efforts to sell the same, if a sale or exchange of said property is made while in charge of said company, I agree to pay for their services a commission of 2 1-2 per cent on above price. My title is perfect, and, in event of sale, general warranty deed will be given.

“I reserve the right to terminate this agency at any time on thirty days’ notice in writing. It is further agreed that, if no sale be made, I am to be at no expense whatever.”

At the date of the contract plaintiff had in its service an employee by the name of Max Weinburg, who testified at the trial that during the summer of 1907, and therefore subsequent to the date of plaintiff’s agency, he mentioned to Ben F. Reinberger defendant’s property, proposing to sell it to Reinberger for a home, as he said he wanted to buy a home, or rather his wife did. The same witness said further defendant told him about the middle of May, 1908, defendant had sold his house; that the next day Weinburg met Reinberger and the latter said he had bought

a house but could not tell the witness what house he had bought until the last of the month; thereupon witness told Reinberger that he (Reinberger) had bought defendant's house and Reinberger laughed. The witness communicated these facts to the plaintiff company and the latter, May 15, 1908, wrote a letter to defendant, stating plaintiff had been given an exclusive contract for the sale of the property, subject to the termination of the agency by defendant at any time on thirty days' written notice; saying further, plaintiff had received notice from defendant April 30th of the withdrawal of the agency, which would make the agency terminate May 29, 1908; that plaintiff had been informed defendant had contracted to sell the property to Ben F. Reinberger for \$6500 and if this was the case, though a deed had not yet passed, plaintiff would be entitled to a commission on the sale and it should be closed through plaintiff; that Weinburg had submitted the house to Reinberger six months before and had worked with him and others trying to make a sale. This letter was not answered by defendant. A contract in writing signed by Lamar and by Reinberger and his wife and dated June 1, 1908, is in evidence and shows a sale of the property by defendant to Reinberger. The contract recited the receipt of one hundred dollars from Reinberger as earnest money and part of the purchase price, and stated the terms of the sale, to-wit, \$2600 cash and that the sale was subject to a first deed of trust for \$4000, etc.; said further if the title was found to be imperfect on examination and could not be perfected within a reasonable time, Reinberger was to be paid the reasonable cost of examining the title and the earnest money was to be refunded; that the sale was to be closed June 1, 1908, at the Savings Trust Company, and if not closed by said date owing to the failure and neglect of the purchaser to comply with the terms, the earnest money was to be forfeited. Reinberger testified his wife bought the property and paid \$6600 for it, that on June first

the abstract of title had already been run down, but there was no sale until said date; that he knew of no earlier contract than the one mentioned but he and his wife saw the property in May; did not see it the latter part of April; saw it early in May. He was asked if he bought the property or had an agreement to purchase prior to the date of the written contract, though no agreement was put in writing, and answered in the negative; testified defendant said he would not be able to sell the property until June first; that the sale was closed about one o'clock June first, though the earnest money receipt was signed at nine o'clock on the morning of said day. The following notice from defendant to plaintiff was put in evidence:

"When I listed my property (5209 Kensington avenue) for sale, and thereby appointing you exclusive agent for same, it was agreed that whenever I desired to take the same out of your hands, I would have to furnish you with thirty days' notice of my intention of doing so. Please accept this, therefore, as notice of my withdrawal of said property from your agency at the expiration of said period (*viz.*, May 29, 1908)."

Said notice was received by plaintiff on April 29, 1908, and was acknowledged by it May first. May 30th was Memorial Day and Saturday, the next day, May 31st, of course, being Sunday. Defendant testified, identifying the earnest money receipt signed by Reinberger, that it was signed on June 1, 1908. There is some contention about the date at the head of this instrument, plaintiff insisting it had been written originally under some date in May and the month erased and June written over it. Reinberger testified the stenographer had written in the wrong date, but he discovered it and had it changed; that the instrument was signed June first and the deed was also signed June first. Defendant admitted he told Reinberger he did not want to close the trade before the first of June and admitted, too, he made the statement

because he felt if he sold prior to June first, he might be liable to plaintiff for a commission; said he told Reinberger this before June first. He denied that Reinberger had agreed to buy the property before May 29th and testified further he did not close the sale because he felt he might be liable for the commission. This witness contradicted the testimony of other witnesses who said defendant had testified before a justice of the peace where the case was first tried, that he had had an agreement prior to May 29th for the sale of the property and delayed closing it until the thirty days' notice had expired by which he had revoked plaintiff's agency and did this to "split the commission with Reinberger." The court below asked defendant while on the stand, whether as a matter of fact defendant's reason for postponing the closing of the sale until June first was not because defendant thought he would not be liable for the commission after that time and the witness answered: "Yes." The treasurer of the Title Guaranty Company testified Reinberger ordered a certificate of title to the property and his company made out and delivered the certificate on May 29, 1908, to Reinberger, it having been ordered by the latter on May 26th. Another witness testified to overhearing the conversation between Weinburg and Reinberger in which Weinburg proposed to sell Reinberger a house and Reinberger said he had already bought one. Weinburg asked him where it was and Reinberger said he was not at liberty to state and could not state until the end of the month. Weinburg said he (Reinberger) had bought Dr. Lamar's house. The evidence showed plaintiff had gone to expense in advertising the property for sale. Such, in substance, was the testimony in the case, the contention between the parties being mainly this: Plaintiff insists defendant had entered into an agreement to sell the property to Reinberger or the latter's wife, some time prior to May 29th, when plaintiff's agency would terminate, and deferred closing the sale for the purpose



of evading payment to plaintiff of a commission; whereas, defendant contends no sale had been agreed upon until June first. Besides this position on said proposition, defendant further contends he had the right to sell the property at any time pending plaintiff's agency without paying a commission to the latter, if he made the sale himself and plaintiff was not the procuring cause of it. Two instructions to that effect were requested and refused. Another contention of defendant is that if no deed, contract of sale, receipt for earnest money, or other written instrument contracting to sell the property had been signed, executed and delivered until after the termination of the agency and plaintiff was not the efficient cause of the sale, it was not entitled to a commission. At the conclusion of the evidence the court directed the jury to return a verdict in plaintiff's favor, which having been done and judgment entered accordingly, defendant appealed.

The quoted clause of the contract said in so many words if a sale or exchange of the property was made while in the charge of the company, defendant agreed to pay a commission on the price, and this clause is incompatible with the theory that defendant reserved the right to sell himself during plaintiff's agency without paying a commission. [Chapin v. Bridges, 116 Mass. 105; Cooke v. Blake, 98 Mich. 105; Metchalfe v. Kent, 104 Ia. 487.] In this connection we reject the argument that the court was bound to submit to the jury the question of whether the contract between plaintiff and defendant for an agency by the former took effect. It is true the instrument appointing plaintiff agent was not signed by it, but the uncontradicted evidence shows it acted under the instrument and advertised the property extensively; this made the agreement bilateral. [Schoenmann v. Whitte, 136 Mass. 332, 19 L. R. A. (n. s.) 598, and note.] Neither do we accede to the proposition that if defendant had entered into a definite agreement with Reinberger by which defendant

agreed to sell the property to the latter and his wife and they agreed to buy it, this was not a sale which would entitle plaintiff to his commission because not evidenced by an instrument in writing. If such an agreement was made prior to the termination of plaintiff's agency on May 29th, and the execution of a deed was deferred merely for the purpose of evading liability to plaintiff for a commission, the contract of sale was so far effective as to entitle plaintiff to a verdict; though no doubt the title would not pass until the conveyance was executed. The instrument by which plaintiff was appointed agent would be defeated in one of its main provisions if a complete agreement might have been reached by defendant and the Reinbergers, and yet liability to plaintiff be evaded by postponing the formal consummation of the sale until its agency expired. Such an interpretation would relieve defendant from the duty to observe good faith in keeping his agreement with plaintiff. But though the foregoing proposition is sound if a sale was actually agreed upon between defendant and the Reinbergers prior to May 29th, it is also a sound proposition that defendant had the right to refuse to agree to sell to them until after May 29th and to do this for the purpose of escaping the payment of a commission. Otherwise stated, we hold the contract bound defendant to pay the commission if he sold the property during the period of the agency, but did not bind him to make a sale during said period unless a buyer was found by plaintiff. The utmost of his obligation to plaintiff was to allow it to find a purchaser while its agency continued and thereby earn a commission, or to pay plaintiff a commission not earned by it in the event defendant found a buyer and sold during the period. Defendant would have been within his rights in refusing to sell until the expiration of the agency.

The point of real difficulty is whether the evidence showed so conclusively a sale had been agreed upon between defendant and Reinberger prior to May 29th and

the consummation of it by payment of the purchase money and execution of the deed had been postponed until after said date, as to warrant the court to order a verdict for plaintiff. The evidence is extremely cogent in its tendency to prove those were the facts. Defendant himself admitted his reason "for postponing the closing of the sale until June first" was because he thought he would be liable for a commission if he closed before said date; and there is much similar evidence. The words of defendant are somewhat ambiguous if read along with the rest of his testimony. They might be understood to mean, either that he had agreed with Reinberger upon the terms of the sale and postponed closing the matter or that he had postponed coming to any agreement until June first. Both he and Reinberger testified there was no sale prior to said date and Reinberger said he knew of no contract prior to the one of June first; said also he had no agreement to purchase prior to said date which he had not put into writing; had no verbal agreement; said he had no verbal agreement because Dr. Lamar declared he would not be able to sell until June first. Lamar testified he had a talk with Reinberger prior to the date of the purchase money receipt and mentioned the price to him, but denied Reinberger agreed to buy. This testimony looks to be inconsistent with the great weight of the evidence. Nevertheless after reflecting over the question we have concluded the issue was for the jury and the peremptory instruction was wrongly given. In the brief for plaintiff the contention put forward is that all the credible evidence tended to prove an agreement of sale had been entered into by Reinberger and defendant prior to June first. If there was substantial testimony on both sides of the issue, it was for the jury to pass on the credibility of the evidence as a whole.

The judgment is reversed and the cause remanded. All concur.

**PEOPLE'S UNITED STATES BANK, Appellant, v.  
RUSSELL P. GOODWIN et al., Respondents.**

**St. Louis Court of Appeals, May 3, 1910.**

1. **LIBEL AND SLANDER: Corporations: Right of Action by.** While, where a publication is a libel on the individual members of a corporation, but not on the corporation, the latter cannot recover therefor, unless it suffers special damage, yet a corporation may maintain an action for damages caused by a libel affecting its pecuniary interests by reflecting on its solvency, the honesty of its management, or the quality of its products.
2. **———: ———: Libel of Bank: Charge of Misappropriation of Funds by Officers.** A published statement that a fraud order was issued against plaintiff bank by the Postmaster-General, for the reasons that sales of its stock had been made and deposits induced upon false representations and that the funds of the institution were being misapplied, meant that plaintiff's managing officers, acting for the corporation, were applying its funds to illegal purposes, and not that the officers acting as individuals were doing so, and hence was actionable as a libel against the bank, without averment of special damage.
3. **———: ———: Charging Misconduct by Officers.** An accusation of misconduct on the part of corporate officers, acting as and for the corporation, which discredits its solvency or impairs its business, is a libel on the corporation, and is actionable by it, without averment of special damage.
4. **———: ———: Libel of Bank: Fraud Order Issued by Postmaster-General.** If defendant stated in writing that the reason why the Postmaster-General issued a fraud order against the plaintiff bank was because its funds were being misapplied, when the Postmaster-General gave no reason for issuing the order, defendant is liable in an action against it by the bank for libel.
5. **———: ———: ———: ———: Privileged Matter.** The Postmaster-General, being a high official of the National Government whose acts as such are of interest to the general public, a fair publication, made as a matter of news or public concern and without actual malice, of what such officer does officially and the reasons he gives for his acts is privileged.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. H. Williams*, Judge.

REVERSED AND REMANDED.

*Carter, Collins & Jones and Barclay, Fauntleroy & Cullen* for appellant.

(1) Under the modern law a banking corporation is fully entitled to protect and to enjoy its good name and reputation against attack and injury by written or printed defamation, impairing public confidence in its conduct, as is a private individual. *State v. Boogher*, 3 Mo. App. 445; *Boogher v. Life Assn.*, 75 Mo. 322; *St. James Academy v. Gaiser*, 125 Mo. 517; *Coal Co. v. Gross*, 126 Wis. 24, 105 N. W. 225; *Railroad v. Pub. Co.*, 48 Fed. 206; *Sternberg Co. v. Miller Co.*, 170 Fed. 298. (2) The statutory definition of libel in Missouri accords with the general law elsewhere, and so a printed publication "tending" to "deprive him of the benefits of public confidence" is a libel whether it concerns an individual or a business corporation. *R. S. 1899*, sec. 2259; *Bank v. Day*, 73 Minn. 195; *Coal Co. v. News Assn.*, 1 Q. B. 133; *Journal Co. v. Maclean*, 23 Ont. App. Rep. 324; *Minteer v. Bradstreet*, 174 Mo. 486; *Cox v. Lee*, L. R. 4 Exch. 284 ("ingratitude"). (3) where the natural effect of the defamatory written matter is to subject its object to injurious thought or opinion of the reader in relation to his business or trade it is actionable of itself, without more. A charge or written intimation that a business corporation is mismanaged is naturally injurious to its name, credit and reputation, and is actionable in itself. *Linotype Co. v. Machine Co.*, 81 L. T. 331 (House of Lords); *Sternberg Co. v. Mfg. Co.*, 170 Fed. 298; *Bank v. Thompson*, 23 How. Pr. 253; *Brewery Co. v. Bradstreet*, 9 B. C. R. 435. (4) Where a meaning is ascribed by *innuendo* (as fully as in this case) to the libelous matter, and that meaning is damaging to the object of the writing,

in respect of its or his business, no special damage need be alleged or proved, whether the victim be an individual or a company. *Boogher Case*, 75 Mo. 322; *Keemle v. Sass*, 12 Mo. 499; *Riding v. Smith*, 1 Ex. Div. 91; *Thomas v. Williams*, 14 Ch. Div. 864; *Odgers, Libel & S.* (4 Ed., 1905), p. 36; *Butler v. Hawes*, 7 Calif. 87; *Chinese Assn. v. Pub. Co.*, 13 B. C. R. 141; *Boal v. Printing Co.*, S. C. 1120. (5) If the alleged defamatory matter is susceptible of an innocent interpretation but a defamatory one is alleged, it is a question of fact which interpretation is proper in view of the circumstances proved at the trial. In this instance, however, it is not doubtful or ambiguous what the average reader would understand by the charge that a bank's funds were being "misapplied." *Williams v. Beaumont*, 10 Bing. 260; *Callahan v. Ingram*, 122 Mo. 367; *Hunter v. Ferguson*, 8 S. C. (5th series) 574. (6) A written or printed charge of misapplication of the funds of a banking corporation is substantially a charge of criminal misconduct in the management of the bank. *Bank v. Thompson*, 18 Abb. Pr. 413; *Jewett v. U. S.*, 100 Fed. 832, 53 L. R. A. 568; *U. S. v. Youtsey*, 91 Fed. 864; *Compare Winchester v. Howard*, 136 Calif. 432, 64 Pac. 692. (7) The National Bankrupt Law and the Bankruptcy Act both designate "misappropriation" or "misapplication" of funds as closely akin to embezzlement thereof, or to abstracting them. The former defines such act as a crime, punishable by imprisonment for at least five years (now a felony, U. S. Penal Code, 1910, sec. 335, Act March 4, 1909); the Bankruptcy Act declares such conduct (when the basis of indebtedness) enough to exclude the effect of the release given by a discharge in bankruptcy. R. S. U. S., sec. 5209; 5 Fed. Stats. Ann., p. 145, sec. 5902; 1 Fed. Stats. Ann., p. 578, sec. 17; 10 Id. (Act, 1903), p. 42, sec. 5 (amending sec. 17). (8) The Missouri Statutes make misapplication of a bank's funds a ground for winding up its affairs, because it amounts to "illegal

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and unsafe or unauthorized practices" of a bank. And the misapplication of its funds by any officer of a corporation by converting same to his own use is a criminal act. R. S. 1899, secs. 1305, 1912. (9) No special damage need be alleged in such a case as the facts recited here exhibit, where the libelous charge has naturally a damaging effect on the business or trade of or public confidence in, the incorporated victim of the charge. To quote Lord HALSBURY'S summary of the law of England on this point, a corporation "can maintain an action for a libel reflecting on the management of its trade or business, and with this without alleging or proving special damage." 8 Halsbury's, Laws of England, "Corporations," p. 390, sec. 857; *State v. Boogher*, 3 Mo. App. 442; *Coal Co. v. News Assn.* (1894), 1 Q. B. 133; *Linotype Co. v. Machine Co.*, 81 L. T. 331 (Halsbury, L. C.). Neither allegation nor proof of any special damage is requisite in an action for libel which is defamatory *per se*, but the damages may be alleged "at large" (as the English judges say) or merely generally, as usual in this country. *South Hetton Co. v. News Assn.*, 1 Q. B. 133; 25 Cyc. 453 and many cases cited. (10) No statement of any "extrinsic facts" or colloquium is requisite to point a moral or adorn the tale involved in a charge that the funds of a banking corporation are "being misapplied," further than the application of the charge to plaintiff by the statutory form (prescribed by the code to abbreviate the verbosity of ancient special pleading) and the facts stated in the petition under review. That the defamatory matter was written "of and concerning plaintiff" (as alleged in the petition) is admitted because specifically "not controverted in the answer." R. S. Mo., sec. 635; *Caruth v. Richeson*, 96 Mo. 186.

*Chester H. Krum* for respondents.

STATEMENT.—This appeal was taken from a ruling of the court excluding any evidence on the ground the

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petition did not state a cause of action. The plaintiff took a nonsuit in consequence of that ruling and after fruitless motions, appealed. The petition is as follows:

"Plaintiff, People's United States Bank, by its attorneys states that said bank was duly organized in the year 1904 as a banking corporation, under the general laws of the State of Missouri, and especially under article 8 of chapter 12, of the Missouri Revised Statutes of the year 1899, and as such corporation in November, A. D. 1904, was duly granted a certificate by the Secretary of the State of Missouri to the effect that said bank had complied with the provisions of said corporation laws; that during the said month of 1904, plaintiff began the business of banking as such corporation accordingly, and its franchise and good will as such then became and were of great value, and plaintiff is now a banking corporation under the laws of Missouri.

"Plaintiff further states that said defendants Russell P. Goodwin and Robert M. Fulton, maliciously contriving and designing to injure plaintiff's franchise, good name, fame and reputation, did, on or about the 19th day of March, A. D. 1907, wickedly, maliciously, knowingly and intentionally, falsely, wrongfully and unlawfully compose, write, instigate, dictate, publish and circulate, of and concerning said plaintiff, and cause to be written, composed, dictated, published and circulated, of and concerning said plaintiff, a certain false, malicious, scandalous and defamatory libel of the following tenor, to-wit: "The funds of the institution" (meaning thereby of plaintiff) "were being misapplied," meaning thereby to charge and in fact charging, that the plaintiff was misapplying, and causing and permitting its funds to be misapplied, on July 6, 1905, as further shown by the context of said libel, which context and its relation to said libel are shown by the following printed language composed, instigated, writ-



ten, printed, published and circulated by said defendants wherein said libel appears, to-wit:

“One of which was the People’s United States Bank, against which a fraud order was issued by the Postmaster-General on July 6, 1905, for the reason that sales of its stock had been made and deposits induced upon false representations and promises and that the funds of the institution were being misapplied.”

“That by defendants’ said false, malicious and defamatory libel charging that the funds of the bank (meaning thereby of plaintiff) were being misapplied, said defendants meant and intended thereby to allege and charge that said bank (the plaintiff) on July 6, 1905, was being improperly and illegally managed, directed and conducted, in that said funds were being misapplied by said bank to other uses and purposes than those which were lawful and proper under the charter and by-laws of said bank and the laws of this State then regulating and directing the management and action of said bank.

“That by said false and malicious libel plaintiff has been damaged and injured in its good name, fame and reputation, and will continue in future to be so damaged in the sum of twenty-two hundred dollars, in actual damages; and inasmuch as the wrong and injury aforesaid was willfully, maliciously and intentionally done by defendants to plaintiff, the latter is therefore justly entitled to demand and recover, and it does hereby demand of defendants on that account the further sum of twenty-two hundred dollars as punitive and exemplary damages therefor.

“Wherefore plaintiff prays a verdict and judgment against said defendants for the total damages aforesaid in the sum of forty-four hundred dollars and for its costs.”

GOODE, J. (after stating the facts).—Doubtless what was intended by the fraud order said in the alleged

libel to have been issued by the Postmaster-General, was an order based on the statute of the United States authorizing that official to instruct postmasters to return all registered letters to the postmaster of the office if they were mailed, with the word "fraudulent" plainly written or stamped on the outside, in cases where such letters arrived directed to a person, firm, bank, corporation or association of any kind, on evidence satisfactory to the Postmaster-General that the person, bank, company or association is engaged in conducting a lottery . . . or any scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises. [2 Compiled Stat. U. S. (1901), sec. 3929.] In support of the judgment below it is argued the supposed libelous matter, to-wit, "the funds of the institution were being misapplied," was no reflection on the bank itself, but on its officers, and if actionable at all, was so only on behalf of said officers; not of the bank. Proceeding with this argument, it is said that if the words meant the bank was being improperly and illegally managed and conducted, as the bank could not conduct itself, the statement did not libel the bank. In dealing with this question we have looked into every authority we could find without becoming sure what the law is. A bank or other business corporation may maintain an action for a libel which affects its pecuniary interests by casting an imputation on its solvency, the honesty of its management or, in the case of a vending or manufacturing corporation, on the quality of its wares or products. [Odgers, Libel and Slander, 552; Townshend, Libel and Slander (4 Ed.), sec. 263.] But a company cannot recover for words which do not libel it, but its individual members; at least unless it suffers a special damage from the libel, and none is alleged in the present case. [Odgers, *supra*.] The point of doubt is whether the words declared on in the present case reflect on the bank itself so di-

rectly instead of incidentally, as to libel it. To say a clerk of a merchant had embezzled a large part of the merchant's capital might impair confidence in the latter's solvency, so as to enable him to maintain an action for libel if special damage was averred and proved. We do not think the charge would be actionable *per se* at the suit of the employer. As regards a corporation the conditions are somewhat different, for it can only act through its officers. Our best judgment is, the libel in question is expressed in such a form that it might be understood naturally to mean the managing officers of the institution, by acts which were those of the corporate body, were applying its funds to purposes and in ways a banking company is not allowed to apply funds; not that said officers were, as individuals, applying the funds in illegal ways for their own benefit or some one else's—that they were misapplying by acts of the corporate body. The context of the alleged libel is pointed to in the petition as explanatory of the object and meaning of the libel. That context said a fraud order had been issued against the People's United States Bank, thereby designating as the object of the order the corporation itself. It then proceeded to say the reason for the action of the Postmaster-General was that sales of the bank's stock had been made and deposits induced upon false representations and promises and the funds of the institution were being misapplied. A bank would induce deposits, whether by fair or by false representations, in the way the bank would do any other act. It is true the officers would move in the matter and by their conduct deposits would be induced; but nevertheless the inducement would be regarded as having been made by the bank. The conduct imported by the words charged as libelous—that the funds of the institution were being misapplied—is not so obviously corporate conduct, for the reason that it might be taken to mean the funds were embezzled or otherwise misapplied to the detriment of the institution and its share-

holders. But the expression, "the funds of the bank were misapplied" could be understood to signify it was being illegally managed and conducted by those in control in order to make money for it and its stockholders by speculation and other unlawful methods. If the libel would be naturally taken to mean unlawful corporate action in dealing with the funds, it libeled the corporation, whether the illegal application was intended to profit it or not. Such conduct would tend to deprive the bank "of the benefits of public confidence," to quote words from our statute defining libel. [R. S. 1899, sec. 2259.] We have found many cases wherein libelous matter which discredited the solvency of a corporation or was likely to injure its trade or business was held to be actionable by the company and that too without averment or proof of special damage—a point that might as well be disposed of here. [Shoe & Leather Bank v. Thompson, 18 Ab. Pr. 413; Knickerbocker Ins. Co. v. Ecclesine, 42 How. Pr. 198, 207; Arrow Steamship Co. v. Bennett, 73 Hun 81; Railroad v. Publishing Co., 48 Fed. 206; American Book Co. v. Gates, 85 Fed. 729; Sternburg Mfg. Co. v. Miller, etc., Mfg. Co., 170 Fed. 298; Printing Co. v. Maclean, 23 Ont. App. 324; Coal Co. v. News Assn., L. R. 1 Q. B. (1894) 133; Linotype Co. v. Typesetting Co., 81 L. T. 332; Gas. & Coal Co. v. Rose, 126 Wis. 34; Filtration Co. v. Lingane, 19 R. I. 316; Midland Pub. Co. v. Trade Journal, 108 Mo. App. 223, 83 S. W. 298; Martin Co. Bank v. Day, 73 Minn. 195.] If the matter alleged libeled plaintiff, we have no doubt the petition is good though it contains no averment of special damage, and this the authorities *supra* demonstrate. In only two of them, we believe, or at most three, were the libelous words of such import as to bring the decision into point on the question of whether the libel charged in the petition at bar can be taken to libel the plaintiff. In *Bank v. Day*, *supra*, the publication called some one a "Shylock," spoke of him as "shouting, 'Plenty of money,' while at

the same time he was losing in every line of business;" said it was an open secret he "had bitten off more than he could chew and was having hard sledding financially; that the county money was his only salvation." The complaint alleged a man by the name of Ward who was the principal stockholder of the bank, one of its main officers, actively engaged in its management, well known in the community, was referred to by the word "Shylock;" that the plaintiff was referred to through him as its agent and manager and the people who read the article so understood it. The complaint was demurred to mainly on the ground it appeared the words published could not apply to the bank. The Supreme Court of Minnesota said the language was clearly defamatory and if used in reference to the corporation, contained an imputation of insolvency and tended to impair its credit. Further reasoning on the question, the court said a corporation could only act through its managing officers, and if the article referred to the financial condition of the bank as produced by Ward as its managing agent, and the bank and Ward were so identified in popular understanding and speech that the article would be defamatory of the bank, though it appeared on its face to refer to Ward personally, then it might be shown by extrinsic facts the article referred to plaintiff and would be so understood by those who read it. That case goes far and much farther than we need go to hold the matter in question in the present case was defamatory of plaintiff. As said, it probably would be understood to charge the plaintiff bank with dishonest and illegal management of its funds, and thereby impair confidence in its stability and diminish its custom. In *Shoe & Leather Bank v. Thompson*, the alleged libel said there were counterfeit notes of the bank and the signatures on the genuine notes were so alike, the bank's officers were in doubt which were good. Those words were held to libel the bank as tending to injure its business and impair its credit. In

Linotype Co. v. Typesetting Co., the libel discredited the efficiency of typesetting machines manufactured by the plaintiff, by saying five of said machines had been used in a newspaper office for a short time and removed after trial. The contention was this criticism of the machines manufactured by the plaintiff did not libel the plaintiff. The court held otherwise, on reasoning, the effect of which is that the publication would injure the business of the company by injuring the reputation of its machines, and was a reflection on the plaintiff in the way of its trade. Two analogous cases were cited in the opinion in support of its doctrine and do support it; which is enough to say, without digesting them. [Harmon v. Delaney, 2 Stra. 898; Evans v. Harlowe, 5 Q. B. 624.] In Railroad Co. v. Pub. Co., 48 Fed. supra, the court said language which charged a railway company with such incapacity or neglect in conducting its business that belief in the truth of the charge would cause persons not to employ it as a common carrier, was libelous. Similar statements of the law may be found in other cases; and, of course, neglect and misconduct in management would result from resolutions and actions of the officers of a corporation, just as a misapplication of the funds of plaintiff bank would; but in either instance the conduct of the officers would be, in legal consequence, the conduct of the company. Therefore the courts seem to hold that an accusation of misconduct on the part of corporate officers when acting as and for the corporation, which discredits the solvency of the company or will impair its business, is a libel on the corporation.

It is urged for defendants the words charged cannot be regarded as a libel, because they were the statement of a reason, whether a statutory one or not, why the Postmaster-General issued a fraud order against plaintiff. On the face of the petition it is ambiguous whether the publication intended to say the Postmaster-General had assigned such a reason for his order, or the

defendants were undertaking to explain the issue of the order by imputing reasons to the Postmaster-General. If that official gave no such reason, then defendants are liable unless they can prove the truth of the charge. The question of difficulty is whether or not, if the Postmaster-General did assign the published matter as a reason for his action, this clothes said matter with a *quasi* privilege, so defendants are not liable unless they published from express malice. Authorities on this question are meager and perhaps not harmonious. The Postmaster-General is a high official of the National Government and his acts as such are of interest to the general public. We simply say that in our judgment a fair publication, made as a matter of news or public concern and without actual malice, of what such an officer does officially and the reasons he gives for his acts, should be privileged, and we hold it is upon persuasive authorities, though we find none on either side of the question in this State. [McClure v. Pub. Co., 38 Wash. 160; Meteye v. Times Dem. Co., 47 La. 824; Wason v. Walter, L. R. 4 Q. B. 73; Connor v. Pub. Co., 183 Mass. 475; 25 Cyc. 410, and cases cited in notes.] In said treatise the rule is thus stated: "An accurate and impartial account of executive or legislative proceedings and investigations is privileged when made in good faith." That ought to be the law, considering the widely diffused interest among the people in what great officers of the government do in their official capacity, and the beneficial influence on the conduct of public affairs of disseminating information on the subject. We do not see why the public is not entitled to be informed the Postmaster-General has issued a fraud order against some person or company and of the reason assigned for doing so, but think no one will be harmed and many perhaps helped on the whole, by publishing the facts.

The judgment is reversed and the cause remanded. *Reynolds, P. J.*, concurs; *Norton, J.*, not sitting.

**HERMAN LUCKS, Respondent, v. NORTHWEST-  
ERN SAVINGS BANK, Appellant.**

St. Louis Court of Appeals, May 3, 1910.

1. **INSTRUCTIONS: Ignoring Facts.** An instruction which ignores a concession of fact made by the party requesting it is properly refused.
2. **BANKS: Evidence: Admissions: Entries in Passbook.** Where an entry in a bank depositor's passbook was canceled by the bank on first detecting it, and the evidence tended to show it was erroneous, it could not be regarded as an admission by the bank.
3. **——: Action by Depositor: Evidence: Entries in Passbook.** In an action against a bank by a depositor for a balance claimed to be due him on his account, entries in his passbook proved to have been made by the bank's officers make a prima facie case in his favor.
4. **——: ——: Instructions: Singling out Facts.** Where, in an action against a bank for a deposit, it appeared the bank canceled its entry in the depositor's passbook on first detecting it and offered testimony to prove the entry was erroneous, an instruction that the entries made by the bank on the depositor's passbook were admissions by the bank that the amounts so entered were deposited by the depositor, was erroneous, because giving undue emphasis and weight to the entry.

Appeal from St. Louis City Circuit Court.—*Hon. Virgil Rule, Judge.*

REVERSED AND REMANDED.

*Geo. W. Lubke and Geo. W. Lubke, Jr. for appellant.*

(1) That part of the instruction given by the court of its own motion was manifestly erroneous and prejudicial to defendant. (a) It singled out and commented on the passbook entries and gave them prominence over the other facts shown by the evidence. This



has been held unfair by a long line of decisions of the Supreme and Appellate Courts of this State. *Fine v. St. Louis Public Schools*, 30 Mo. 175; *Jones v. Jones*, 57 Mo. 138; *State v. Elkins*, 63 Mo. 166; *Barr v. City of Kansas*, 105 Mo. 559; *Smith v. Woodmen of the World*, 179 Mo. 137; *McFadin v. Catron*, 120 Mo. 274; *Railroad v. Stock Yards*, 120 Mo. 565; *Williams v. Stephens*, 38 Mo. App. 158; *Swink v. Anthony*, 96 Mo. App. 420; *Imboden v. Trust Co.*, 111 Mo. App. 242; *Connelly v. Railroad*, 120 Mo. App. 652; *James v. Insurance Co.*, 135 Mo. App. 251. (b) It tended to impute to the passbook entries a contractual obligation or promise of defendant. *McKeen v. Bank*, 74 Mo. App. 289; *Bank v. Morgan*, 117 U. S. 106. Entries in the passbook of a depositor are not writings for the payment of money and no liability is created by these entries, express or implied, "to pay the depositor the sums therein acknowledged to have been received;" they are in the nature of receipts, and actions therefor are barred by the five-year Statute of Limitations. *Quattrochi v. Bank*, 89 Mo. App. 500. There is no such sanctity about a receipt which "makes it conclusive." *Aull v. Trust Co.*, 149 Mo. 17. (c) The language, "a reasonable explanation of such entries," as used in the instruction, was vicious and was calculated to confuse or to mislead the jury. They were not told for what purpose; in what line or direction the "reasonable explanation" was required. *Buel v. Transfer Co.*, 45 Mo. 562; *Railroad v. Dawley*, 50 Mo. App. 480; *Gebhardt v. Transit Co.*, 97 Mo. App. 373. (d) The instruction was inconsistent in that the latter part of it conflicted with the first and thus rendered the whole misleading. It first put the burden of proof on the plaintiff, which was correct; and then shifted the burden to defendant. A long line of decisions of the Supreme and Appellate Courts of this State has also condemned the giving of inconsistent instructions, and especially single instructions which express different and inconsistent views. Such

instructions are regarded as misleading, as it cannot be said by which part the jury was guided. *Wood v. Fleetwood*, 19 Mo. 529; *State v. Foley*, 12 Mo. App. 434; *Hooper v. Insurance Co.*, 93 Mo. App. 111; *Sheperd v. Transit Co.*, 189 Mo. 362. (2) The court also erred in refusing to give the instruction on the burden of proof as asked by defendant, especially since defendant's instruction as asked explained this phrase. Instructions stating on whom the burden of proof rests are upheld in this State, although they do not make this explanation. *Berry v. Wilson*, 64 Mo. 164; *Steinwender v. Creath*, 44 Mo. App. 360. (3) And the court erred in refusing to allow cross-examination of the plaintiff as to his purpose in visiting Mr. Stifel and showing him the passbook; and also erred in sustaining the plaintiff's objection to defendant's inquiry as to the efforts of teller Schulte to learn who made the deposit of the \$40.37 which was "over." There was such conflict in the testimony in the case, direct and circumstantial, that a wide range of inquiry should have been permitted, as in cases involving fraud. *Manheimer v. Harrington*, 20 Mo. App. 301-2.

*Edward A. Raithel* and *R. F. Walker* for respondent.

(1) An instruction should call the attention of the jury to the evidence presented and upon a proper hypothesis, direct what the verdict should be. *State to use v. King*, 44 Mo. 238. Where an instruction states the law correctly, considered abstractly and then proceeds to apply the principle of law to the facts and circumstances in evidence, it cannot be considered commenting on the evidence and liable to mislead the jury or cause them to go outside of the evidence before them. *Dunn v. Henley*, 24 Mo. App. 579; *Beattie v. Hill*, 60 Mo. 72; *Tyler v. Hall*, 106 Mo. 313; *Clark v. Cordry*, 69 Mo. App. 6; *Holliday-Klotz L. & L. Co. v. Markham*,

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96 Mo. App. 51; *Stewart v. Sparkman*, 75 Mo. App. 106; *Bowen v. Lazarlere*, 44 Mo. 383; *Zimmerman v. Railroad*, 71 Mo. 476. The instruction complained of, correctly states the law. It does not attempt to fix the amount of deposit. The entry of a deposit in a passbook to the credit of the depositor is in the nature of a receipt, and is prima-facie evidence that the bank has received the amount from the depositor and entered it to his credit. 1 *Morse on Banks and Banking* (3 Ed.), sec. 290, and quoted with approval in *Quattrochi Bros. v. Bank*, 89 Mo. App. 508. The chief value of the bank book is that the depositor may have a species of check upon the bank, and may use it as evidence upon the occurrence of any dispute and lawsuit. 1 *Morse on Banks and Banking*, p. 502 (3 Ed.), sec. 291a; *Quattrochi Bros. v. Bank*, 89 Mo. App. 510. Defendant should have asked an instruction defining "a reasonable explanation of such entries"—not having done so, it will not be heard, at this time, to complain. *Wheeler v. Bowles*, 163 Mo. 398; *Wood v. Kelly*, 82 Mo. App. 598. An instruction may properly be predicated upon an admission of the party against whom it is given. *Kelly v. Stewart*, 93 Mo. App. 47. It is not error to fail to define words in instructions which a jury of ordinary intelligence understand. If appellant desires such words to be defined, he should ask the trial court to do it and unless he does he cannot complain on appeal. *Kischman v. Scott*, 166 Mo. 214; *Henry v. Budecke*, 81 Mo. App. 360; *Crapson v. Wallace*, 81 Mo. App. 680. (2) An examination of the entire instruction, we respectfully submit, will show that the court properly explained the phrase as to "the burden of proof." (3) We respectfully insist that there was no error committed by the court in regard to the rulings complained of.

GOODE, J.—This plaintiff asked and obtained a judgment for \$197.10 against the defendant bank as being the balance due him on his account. Said action

was filed August 14, 1906. Defendant admitted owing only seventy-five cents, thereby putting in issue \$196.35 of the amount. Plaintiff testified he had deposited said sum of \$196.35 in the bank on May 14th, and an entry on his passbook made by the teller of the bank, as the teller admitted on the witness stand, showed a deposit to plaintiff's credit on said day, either of \$196.35 or \$190.35. There was a controversy as to whether the third figure of the entry was "6" or "0." However, the bank denied plaintiff made a deposit of either \$196.35 or \$190.35 on May 14, 1906, and introduced testimony to prove he did not deposit either sum. The bank's contention was that a man named Vossmeier deposited \$190.35 on May 14th, and this deposit by Vossmeier was, by mistake, entered as a credit on plaintiff's passbook. After May 14th plaintiff did not hand in his passbook to the bank to be balanced until the middle of July, when, on comparing said book with his account as shown on the books of the bank, no entry corresponding to the deposit of May 14th was shown on the bank's books and hence the teller drew a line through said entry on the passbook before returning the latter to plaintiff, who, on seeing the erasure, protested against it. There was further testimony for the bank that no deposit of \$196.35 was made by any one on the day in question, and that only one person (Vossmeier) made a deposit of the other amount. It appears from the record the attorney for the bank, during the trial, admitted plaintiff had made a deposit of some amount not stated or known, on said day. This admission was made in explanation of how the teller came to make an entry, though an erroneous one, in plaintiff's passbook. Without going further into the details or stating the various deposits made by plaintiff and checks drawn by him from March 19, 1906 to July 27, 1906, the date of the last transaction shown, we will state the effect of the evidence and the admissions of defendant's counsel,

which is this: If plaintiff deposited \$196.35 on May 14th, then the bank owed him said amount plus seventy-five cents, or the amount he sued for, \$197.10. If he made a deposit of \$190.35, then the bank owed him that plus seventy-five cents, or \$191.10. If he did not deposit either of those sums, nevertheless the bank must have owed him more than seventy-five cents, the amount admitted in its answer to be shown by its books; for the books showed no deposit on May 14th and it is conceded he made a deposit on that day. The teller testified there was a surplus of forty dollars in cash at the close of the day's business, which could not be accounted for from the books of the bank and was put in an envelope and laid aside. Much evidence was introduced, including the testimony of various entries from plaintiff's account on the books of the bank, the deposit by Vossmeier, testimony of the bank's officials as to the system of bookkeeping and the positive testimony of the teller that plaintiff did not deposit either \$196.35 or \$190.35 on May 14th, though, as said, the teller admitted plaintiff must have been in the bank and have presented his passbook. The points raised on the appeal relate to the court's rulings on instructions. The first instruction requested by defendant and refused by the court proceeded on the theory that plaintiff was not entitled to a verdict for more than seventy-five cents unless the jury found he had made a deposit of \$196.35 on May 14th. This instruction manifestly was erroneous, because the concession of defendant's counsel that a deposit had been made by plaintiff on May 19th would carry the bank's liability to plaintiff beyond seventy-five cents. An instruction was given by the court of its own motion in which the jury were advised, in substance, as follows: That defendant admitted owing plaintiff seventy-five cents, admitted further he had made a deposit on May 14th, admitted its teller made the entries in plaintiff's passbook introduced in evidence, and in view of those admissions the only matter

in dispute and issue to decide was the amount of the deposit on May 14, 1906; that if the jury believed plaintiff deposited \$196.35, they would find a verdict in his favor for \$197.10, with interest from the date the action was filed; that if they believed he did not make a deposit on that day in said amount, they should determine from all the facts and circumstances in evidence the true amount deposited by him, add to said amount seventy-five cents and render a verdict for plaintiff for the sum, together with interest from the date the action was filed. With that part of the instruction we find no fault as the record stands; but the court then proceeded to charge as follows:

"The jurors are further instructed that the burden is upon plaintiff to prove his case by a preponderance, that is to say the greater weight of the evidence, and in this connection you are instructed that the entries made by defendant on plaintiff's passbook are admissions by defendant company that the amounts so entered were deposited by plaintiff with defendant. When the amounts so entered are disputed by defendant, it devolves upon the defendant to furnish to your satisfaction a reasonable explanation of such entries."

We cannot support the quoted part of the instruction, because it singled out the entries in the passbook and commented on them in a way to give them undue weight and emphasis in the minds of the jury. The entries made a prima facie case in favor of plaintiff and would have done so on proof they were made by the bank's officers, apart from his positive testimony in corroboration of them. But as the bank cancelled the entry of May 14th, on first detecting it, and offered a mass of testimony tending to prove it was erroneous, the entry cannot be regarded as an admission. However it was perfectly proper for the entry to go in and have attached to it the importance the jury might deem it deserved, considered along with all the other evidence in the case. [McKeen v. Bank, 74 Mo. App. 289; Quat-

trochi v. Bank, 89 Mo. App. 500; Bank v. Morgan, 117 U. S. 106; First Nat'l Bank v. Clark, 134 N. Y. 368; Tallcot v. Bank, 36 Pac. 1066; 1 Morse, Banks (4 Ed.), sections 290, 291.] We think in instructing the entry was an admission the amount entered had been deposited by plaintiff, the court gave over-emphasis and weight to it. The courts of this State in numerous cases have condemned instructions which seized on some item of evidence bearing on an issue and lent to it undue prominence by comments. [Barr v. Kansas City, 105 Mo. 559, 16 S. W. 483; State v. Elkins, 63 Mo. 166; Connelly v. Railroad, 120 Mo. App. 652, 97 S. W. 616; Williams v. Stephens, 38 Mo. App. 158.] Some of those decisions dealt with errors assigned for commenting on documentary evidence and disapproved the practice. We have been reluctant to reverse the case, but have concluded we cannot feel sure the jury were not induced to attach overmuch importance to the entry in the pass-book by the form of the court's instruction.

The judgment is reversed and the cause remanded. All concur.

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STATE OF MISSOURI, Respondent, v. ISAAC T. COOK, Appellant.

St. Louis Court of Appeals, May 3, 1910.

1. **CRIMES AND PUNISHMENTS:** Failing to Provide Fire Escapes: "Manager" of Building not Necessarily "Keeper" of it. The manager of a building is not necessarily a keeper of it, since one might be styled "manager" if his task in connection with an office building was to look after letting the rooms to tenants and collecting rents, while another person was "keeper," had the custody of the building and was charged with looking after its heating, lighting, water supply, toilet arrangements, improvements, repairs and the regulation of its maintenance generally.

2. ———: ———: ———: **Statutes Construed.** Session Acts 1901, p. 219, section 1, requires the owner, proprietor, lessee, or "keeper" of office buildings, etc., more than three stories high, to provide fire escapes. Section 5 makes the owner, proprietor, lessee, or "manager" of a building, required to be equipped with fire escapes, who neglects for sixty days after the act becomes effective to comply with the act, guilty of a misdemeanor. Acts 1903, pp. 251, 252, repealed the first three sections of the act and enacted new sections in their place, but section 1 of the act as amended requires the owner, proprietor, lessee or keeper of such buildings to provide escapes as in the original act. Section 2 provides that, if a fire escape is found upon inspection to be unsafe, the owner, proprietor, lessee, or keeper shall repair it, and section 5 remains unchanged. *Held*, the words "manager of a building," do not necessarily mean the same as "keeper of a building," or denote any particular duties in relation to the building, and one charged as "manager" of a building with violating the act should not be convicted, in the absence of evidence showing his duties made him a "keeper" of the building and required by the statute to provide fire escapes.

Appeal from St. Louis Court of Criminal Correction.—  
*Hon. Wilson A. Taylor, Judge.*

REVERSED AND REMANDED.

*T. J. Rowe, Thos. J. Rowe, Jr., and Henry Rowe*  
for appellant.

The information fails to allege facts sufficient to constitute any offense against the laws of the State of Missouri, in this that it fails to allege that defendant was the owner, proprietor, lessee or keeper of the building. *Yall v. Snow*, 100 S. W. 1; *Johnson v. Snow*, 102 Mo. App. 233.

*Herbert S. Hadley, Attorney-General, and Frank Blake, Assistant Attorney-General,* for respondent.

GOODE, J.—This defendant appeals from a conviction on an information charging him with willfully and unlawfully neglecting and refusing to provide a steel fire escape attached to the exterior of the Chem-



ical Building on the northeast corner of Eighth and Olive streets in St. Louis, a building sixteen stories in height and used for office purposes. This building was erected eighteen years before the filing of the information; had been used for an office and business building during working hours, no one being allowed in it after eleven o'clock in the evening except the night watchman. The point made for reversal is that defendant is not within the scope of the act on which the information is founded, because he did not have control of the building as owner, proprietor, lessee or keeper. The information charges defendant with having been manager of the building March 10, 1908, and that prior to said date the building was used and occupied by defendant as manager as an office building; that it was his duty as manager to provide one or more fire escapes attached to the exterior of the building, and on said day, disregarding his duty, he willfully and unlawfully neglected and refused to provide a fire escape attached to the exterior of the building as provided by law, contrary to the statute in such case made and provided and against the peace and dignity of the State. The evidence shows defendant was manager of the building at the date laid in the information, but shows nothing whatever regarding his duties as manager or the extent of his authority, or whether he had control of the building. The determination of the point raised turns on the act in relation to fire escapes of 1901, as amended by the act of 1903. The first section of the first act made it the duty of the owner, proprietor, lessee or keeper of buildings of various descriptions, including office buildings and those used as places of business and more than three stories in height, to provide such structures with fire escapes attached to the exterior of the buildings. This is all we need to notice of said section and we call attention to the fact that the word "manager" was not used in it. But in the

fifth section of the act, a misdemeanor was created for a refusal to comply with its provisions. That section said the owner, proprietor, lessee or manager of a building which, under the terms of the act was required to have one or more fire escapes, who should neglect for a period of sixty days after the law took effect, to comply with its provisions, should be deemed guilty of a misdemeanor and on conviction should be punished in the manner described. [Session Acts 1901, p. 219.] It should be observed that in section 5, the word "manager" was substituted for the word "keeper" used in section 1; that is to say, section one imposed the duty of providing fire escapes on the owner, proprietor, lessee or *keeper* of a building, whereas section five required the owner, proprietor, lessee or *manager* to provide the fire escape within sixty days after the act took effect, on pain of being guilty of a misdemeanor. It is manifest the word "manager" is used in section 5 in the sense of "keeper." In 1903 the first three sections of the Act of 1901 were repealed and new sections enacted in lieu of them. The change in the first section seems to have been only the insertion of the words "tenement house" among the words describing the character of the buildings that must be provided with fire escapes. Said section as amended still imposed the duty of providing the escapes on the owner, proprietor, lessee or keeper. Section 2 of the amended act differs materially from section 2 of the original act, but all we need call attention to in the section is that it provided if a fire escape attached to a building should be found on inspection by the commissioner, superintendent of inspection of buildings or the chief of the fire department of the city, to be in an unsafe condition, the owner, proprietor, lessee or keeper should forthwith rebuild or repair the same or place it in a safe condition on written notice from such official. The word "keeper" is again used in that section. Section three of the amendment does not bear upon the present case. The amended

act made no change in section 5 of the original act, which provided the owner, proprietor, lessee or *manager* should be guilty of a misdemeanor if he neglected or refused for a period of sixty days after the law took effect, to comply with its provisions. The delinquency laid in the information was committed after the passage of the amendatory act and as said in March, 1908. The clear purpose of the act as amended and as it was originally, was to place the duty of providing fire escapes and of rebuilding, repairing and replacing them, on the owners, lessees, proprietors or keepers of the buildings designated. A manager could not be convicted under section 5 for failure to repair or rebuild or replace a fire escape as required in section 2 of the amendment, because section 5 creates a misdemeanor on the part of the manager, owner, proprietor or lessee only for failure to provide fire escapes within sixty days after the original act took effect; that is, to provide them in the first instance; not replace or repair them. This defendant was not manager sixty days after the act took effect and so far as appears had no relation at that time to the building which would put upon him the duty to provide a fire escape. If in any view of the law he is answerable criminally under section five, it is because he became manager later of a building which had no exterior fire escape, but which the law required to have one, and defendant, after becoming manager, omitted to provide it. That construction of the law looks extreme, but we rest our decision on another phase of the case. As said, the word "manager" must have been used in the sense of "keeper," for on the keeper of buildings the statutory duty was imposed. Now the manager of a building is not necessarily a keeper of it. We know of no technical or settled meaning of the phrase, manager of a building, which imports the same duties as "keeper," or even signifies in a definite way any duty pertaining to the position of manager. A man might be styled "manager" if his task in connection

with a large office building was to look after letting the rooms to tenants and collecting rents, while another person was keeper and had the custody of the building, was charged with looking after its heating, lighting, water supply, toilet arrangements, improvements, repairs, and generally regulating its maintenance. So, in the absence of any proof of what defendant's duties were, he was not shown to have become manager in the sense that he was a keeper of the building and required by the statute to provide fire escapes.

The judgment is reversed and the cause remanded. All concur.

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**HOOVER P. WINFREY, Respondent, v. SAMUEL LAZARUS, Appellant.**

**St. Louis Court of Appeals. Argued and Submitted, April 6, 1910.  
Opinion Filed May 3, 1910.**

1. **APPELLATE PRACTICE: Weight of Evidence: Conclusiveness of Verdict.** The appellate court will not determine whether the verdict is against the weight of the evidence; that being a matter for the trial court.
2. **MASTER AND SERVANT: Injury to Third Person by Servant: Evidence Held Sufficient to Show Servant's Authority.** In an action for personal injuries caused by the collision of plaintiff's buggy with defendant's automobile, driven by his chauffeur, evidence held to show that the chauffeur was acting under defendant's authority and within the scope of his employment when the accident occurred.
3. **—— ———: Liability of Master.** An employer is liable for damages caused by his employe's negligence while acting in the scope of his employment, though the negligent act was not necessary to the performance of his duties, nor expressly authorized by or known to the employer.
4. **—— ———: Automobile Colliding With Buggy: Instructions: Instruction for Plaintiff Approved.** In an action for personal injuries caused by the collision of plaintiff's buggy with defendant's automobile, driven by his chauffeur, the court

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Winfrey v. Lazarus.

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instructed that if plaintiff's buggy was run into by an automobile operated by one employed by defendant, who was then operating it in the course of his employment and who negligently operated it at a speed greater than was reasonable, in view of the traffic and use of the highway, or so great as to endanger life and limb, and plaintiff's injury was directly due to his negligence, the jury should find for plaintiff. *Held*, the instruction was correct.

5. ———: ———: ———: ———: **Inconsistent Instructions.** An instruction that if the automobile was in the chauffeur's charge at the time of the accident but had been taken out by him at the request of defendant's married daughter, not a member of his household, for her own use, and not on defendant's business, the jury should find for defendant was not inconsistent with the previous instruction, so as to warrant the conclusion that the jury disregard it in finding for plaintiff.
6. **APPELLATE PRACTICE: Instructions: Given at Complaining Party's Request.** A party will not be heard to complain on appeal of an instruction given at his own request.
7. **DAMAGES: Excessive Verdict.** In an action for personal injuries and damage to a buggy caused by a collision between said buggy and an automobile, a verdict in plaintiff's favor for \$800 is *held* not to be so excessive as to warrant interference on appeal.

**Appeal from St. Louis City Circuit Court.—Hon. Eugene McQuillin, Judge.**

**AFFIRMED.**

*W. E. Fisse* for appellant.

*Kinealy & Kinealy* for respondent.

**STATEMENT.**—The defendant in this case, with his wife, left their home in St. Louis about the 12th of June, 1908, for a trip to Europe, on the day of the accident, June 25th of that year, being in Germany. Defendant was the owner of an automobile and he had in his employ as chauffeur one Conley, who was left in charge of the machine and under pay of the defendant during the absence of defendant. The machine seems

to have been kept at the premises of defendant, Conley not living there, however, but at his own home. The residence of defendant, during the absence of defendant and his wife, was in charge of defendant's sister-in-law, the house servants being left there and the house apparently being run in the ordinary way. Mrs. Baker was the married daughter of the defendant. While defendant was absent she appears to have stayed a good part of the time at her father's house with her child. She and her husband, however, had their own place of residence in St. Louis, but on the day of the accident and apparently for some little time before and afterwards, her husband being absent, Mrs. Baker appears to have taken up her residence at her father's house. On the day of the accident, June 25th, she was down town taking lunch with some friends at a store and telephoned to her father's house to have the machine sent down and meet her at the store. This message was conveyed from the house to Conley, the chauffeur, also apparently by telephone, whereupon he proceeded to drive the machine down to meet Mrs. Baker. While on the way down town he ran into the plaintiff's buggy, in which at the time plaintiff was riding, breaking the buggy, throwing plaintiff into the street and, as he claims, injuring him quite severely. He brought suit against the defendant for damages for the injuries sustained, laying them at \$15,000.

Defendant, after a general denial, pleaded contributory negligence on the part of plaintiff, averring that the automobile mentioned in the petition was operated with all due and proper care to avoid any collision with the vehicle of plaintiff and that plaintiff could have avoided the accident by the exercise of reasonable care and diligence on his part.

The reply was a general denial and the trial was before the court and jury.

Plaintiff and several of his witnesses testified to the accident, describing the speed of the respective

vehicles and the place where the accident occurred, there also being evidence as to the nature and extent of the injuries sustained by the plaintiff. Plaintiff also introduced the deposition of Mrs. Baker, who testified that during the absence of her father and mother in Europe, she had lived at her father's house part of the time, going there with her child, her husband being out of town. During the time that she stayed at her father's house she had used the automobile several times; doesn't remember how often; used it whenever she cared to do so; no one had ever interfered with her use of the machine; her father did not tell her that she could use it if she wished to; used the machine prior to the departure of her father just as she did afterwards; whenever she wanted to use it she used it. The only difference in her use of it after her father left was that she did not use it so often; nothing was said one way or the other in the way of placing any restraint on her use of it. Remembers the occasion of Conley bringing the machine to meet her down town on the 25th of June, 1908. When he came down and met her, he told her that he had been in an accident with the machine. Mrs. Baker said she was lunching down town that day with some friends and asked one of the waiters to telephone out to the house to tell Conley to come down after her; just gave the telephone number to the clerk at the store and told him to give the message to whoever answered the telephone. The chauffeur accordingly came down and met her. Asked who was employed in her father's house as servants at that time, she answered, "Why, I'm not sure. I don't know just who it was. I had two girls there just about that time; one left, and then the other one came." Remembered their first names but not their last names.

The deposition of defendant had also been taken and was introduced and read in evidence on the part of plaintiff as admissions by defendant against himself. In answer to the question by counsel for plaintiff in

his direct examination, as to whether his daughter ever used the machine prior to the day of the accident, defendant answered that she did. Asked under what conditions, he said he didn't know. Asked if she used it by herself, he answered, "That I don't know. The machine is her mother's machine; and if you had a daughter you would find out that she used what you had." Asked if he knew that his daughter used it, he answered that he had seen his daughter out riding many times in the machine; that she used it "either with her mother or her auntie, or somebody," and he never paid any attention to it; had never objected to her using the machine; did not object to her asking the chauffeur to bring the machine down to her at the store on the day of the accident after he had heard of it; had never told her anything about the use of the machine; never told her "she could or she could not. She has got the habit of picking up what she wants and going off with it." If she would use it he could make no objection to her use of it any time she wanted to, going wherever she wanted; had no objection at all. He further testified that during his absence in Europe, the machine was under the control of Conley, the chauffeur. Conley was not subject to anybody's direction. He had charge of the machine while defendant was gone and he had told him to go down to the office and get his money every week and defendant's secretary paid him every week. Asked if Mrs. Baker instructed him to go out, he didn't have to go unless he wanted to, he answered, "Well, I guess he would have a mind to." Asked was it the intention that he was to mind Mrs. Baker, he said, "Well, I didn't speak about it at all. I supposed they would run it just like they had always run it, and he would take the machine out." Asked if he would take the machine out on the instructions of the women of the family, he answered that he "supposed so." Defendant was present while this deposition was read on the part of plaintiff and afterwards, being examined as a witness



in his own behalf, he testified that Mrs. Baker was not living at his house when he went away; was not then a member of his household. She lived in her own home on Lindell Avenue; was married; she and her husband have always kept their own house. When he left for Europe, defendant testified, he left the machine in charge of the chauffeur, like he always left it when he went away; nothing was said or done at that time with respect to the use of the machine by Mrs. Baker or anybody else. There was no understanding between him or Mrs. Baker or her husband, that Mrs. Baker should go and live at his house any time during his absence from the city. After he left the city Mrs. Baker had gone over to his house and stayed with her aunt for a couple of weeks, maybe three weeks. Asked if that was by reason of any understanding between them, he answered, "No, just as a daughter, she went over, and I guess she had a right to go if she wanted to. But she is always in her own house ever since she was married. She always is." On cross-examination, asked if the aunt had supervision of the house and the grounds and the automobile, he said: "No; she had nothing to do with the automobiles." Asked if she had no right to instruct the chauffeur about the automobiles, he answered, "She seldom gets into an auto. It is hard to get her in it. She don't have anything to do with it." Conley was supposed to take care of the machine and keep it in order for the defendant; did not tell him about receiving instructions from anybody about taking it out; just left him in charge of the machine. Conley had no authority from him (defendant) at any time to take anybody he wanted to. Asked how often Mrs. Baker had used the machine prior to the trip of defendant to Europe, he said he didn't know; didn't know whether she had ever used it; was of the opinion that she had but didn't know; had never seen her in the machine by herself; had seen her in it with her mother; had seen her in the machine with her husband and her

mother and the "whole bunch of them" would come down after him. The machine carries six people. Had never known his daughter to order the chauffeur to get the machine and bring it to her. Conley was in his employ for about a year and a half prior to the accident and while he was in Europe. Conley had never lived on defendant's premises but stayed around the garage, took care of the machine and his duty was to be there when anybody wanted him. Did not tell Conley anything about using it while he was gone, just said, "there is the machine. Go down and get your money every Saturday night from Charlie." Didn't give him any instructions one way or the other; left the machine in his charge and went off. All the instruction he gave him was, "Pat, take care of this machine and behave yourself, and go down and get your money every Saturday night." This was practically all the evidence in the case touching the ownership and control of the machine on the day of the accident. There was conflict of testimony as to the rate at which the two vehicles were going, as to who was in fault, and as to the extent of the injuries sustained by plaintiff.

At the instance of plaintiff the court instructed the jury that if they believed from the evidence that the plaintiff's horse and buggy were run into by an automobile, then and there in control and being operated by one Pat Conley, and that said Conley was then in the employ of the defendant for the purpose of operating said automobile and was then and there operating the same in the course of said employment, and that he ran it at a rate of speed so high that because of the weight and size of the automobile and character of the street at the place or that he was then and there negligently operating the machine at a rate of speed greater than was reasonable, having regard to the traffic and use of the highway or so great as to endanger life and limb, and the injury to the plaintiff and his horse and buggy was directly due to the negligence on the part of Con-

ley, they should find for plaintiff. The court also instructed the jury as to the measure of damages. These were objected to by defendant and exceptions saved. A number of instructions were given at the instance of defendant, among others, one marked No. 3, which was to the effect that if the jury believed from the evidence that the automobile at the time being driven by Conley was in his charge but defendant and his wife were absent in Europe and that at the time of such injury the automobile had been taken out by said Conley at the direction and request of Mrs. Baker, a married daughter of defendant, not a member of his household, for her own use and on her own business and not for any business of the defendant, they should find for the defendant. It is not necessary to notice the other instructions.

The jury returned a verdict in favor of plaintiff for eight hundred dollars, from which defendant has appealed, filing a motion for new trial and duly saving exceptions.

REYNOLDS, P. J. (after stating the facts).—The errors assigned by counsel for the appellant are, that the verdict is against the weight of the evidence and is not supported by any evidence; that the instructions given by the court at the instance of plaintiff, especially the first, were improper and that the instructions were inconsistent; that under the third instruction given at the instance of defendant, a verdict should have been returned in favor of the defendant, and that the amount of the finding in favor of plaintiff is excessive. Whether the verdict is against the weight of the evidence, is a matter for the determination of the trial judge and not of this court. Counsel contend that the verdict is not supported by any evidence. We have set out the substance of the evidence on the issue as to whether, at the time of the accident, the machine was being operated by one who, at the time, may be said

to have been acting under the authorization of the defendant and within the scope of his employment. We do not think it can be said that there was no evidence whatever to sustain the verdict, so far as involves that issue. We think the evidence which we have set out clearly shows that the case was one for the jury and that its determination rests entirely upon the conclusions that the jury might properly draw from it, determinable by them also on the credit that they gave to the witnesses.

The principle underlying the determination of cases of this character is well set out by Judge NORTON in the case of *Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770, where at page 772 of the last cited publication, it is said, in substance, that the employer is liable for all injuries to person or property caused by the negligence of his employee, if the act which results in the injury is done while the employee is acting within the scope of his employment in the employer's service, though the act was not necessary to the performance of the employee's duties and it was not expressly authorized by the employer or known to him. Judge NORTON, citing many cases supporting this, quotes from *Garretzen v. Duenckel*, 50 Mo. 104, that "when the servant acts in the course of his employment, although outside of his instructions, the master will be held responsible for his acts," referring also to *Snyder v. Railroad*, 60 Mo. 413, in which the foregoing excerpt from the *Garretzen* case is quoted approvingly. It seems very clear to us from the evidence in this case, that the chauffeur, Conley, was acting in the course of his employment by the defendant when he obeyed the direction of the defendant's daughter to bring the machine down for her use. The defendant, by his own testimony, shows beyond room for doubt that when he went on his journey he left this machine for the convenience and at the service of the members of his household. He said, in effect, he did not want to discharge Conley because good chauffeurs

were not easily picked up. But he did more than merely retain Conley in his employ,—he left him in charge of the machine, obviously intending it to be used. He says that they rarely got his sister-in-law to use it. "She seldom gets into an auto. It is hard to get her into it." So there was no one left but his daughter who would be apt to use it. He surely contemplated that she should use it and that Conley would drive it when she did use it. She was the daughter of the defendant, and, for the time being, an inmate of his household, with all the privileges of a daughter in the home of her parents. When defendant was informed of her use of his machine, on his return from Europe, and of the fact of the accident having occurred, according to his own testimony, he made no objection or protest whatever, nor any suggestion that Conley should not have obeyed the demand of the daughter, or of lack of authority in his daughter to control the use of the machine. The facts before the jury unmistakably tended to prove that the chauffeur understood that he was at the direction of the daughter and when he received word from her to come down town with the machine for her, he, without any hesitation, obeyed. The testimony of the daughter even goes so far as to tend to show that she was so far mistress of the household that the servants in the house were under her control. She referred to them in this way, when asked who they were: "I had two girls there just about that time; one left and then the other one came." With testimony of this character before them, the jury had a right to infer that the chauffeur, in bringing the machine down from the garage to the point to which he had been summoned by Mrs. Baker, was acting in the course of his employment, and within the scope of his employment, although he had no specific instructions from his employer to do this particular act or to make this particular trip. The acts of the daughter, the whole trend of her testimony and that of her father, warranted the jury in

finding that the daughter was a member of the household of the defendant; the testimony of the daughter and of the defendant tended to prove that this machine was subject to the control and for the use of the members of the household of the defendant, and that when the chauffeur obeyed any of them in the use of it he was acting within the scope of his employment.

The learned counsel for the defendant cites authorities in support of his contention that the employer is liable only when the employee is acting within the scope of his employment. We not only do not dispute that, but recognize it as the law. When, however, he attempts to argue that this chauffeur was not acting within the scope of his employment and for that relying particularly on the case of *Clark v. Buckmobile Co.*, 107 N. Y. App. Div. 120, we do not agree with him nor do we think this authority meets the case at bar; it is not analogous, in its facts, to the case at bar.

The first instruction, of which we have given a sufficient synopsis to show its import, was correct and is not subject to the assignment of error levelled against it. Neither do we think that there was any inconsistency in the instructions, which we assume is meant to apply to defendant's third instruction as contrasted with the first one given at the instance of plaintiff. We do not think instruction numbered three is inconsistent with number one, or of such a character as to lead to the conclusion that the jury by their verdict, entirely disregarded it. The jury are told by that instruction, in substance, that they are to find for the defendant unless they find that at the time of the use of the machine by the direction of the daughter, the daughter was a member of the household of the defendant. That very properly left it to the jury to determine whether the daughter was or was not a member of the household of the defendant. If the jury, on the evidence, found that she was such member, it cannot be said that their verdict was in disregard of this instruction. If the

clause referred to, requiring the jury to pass on the question of whether the daughter was a member of the household, had been omitted from this third instruction and the instruction given with that omission, it would have been unmistakably and clearly error. Even as it is, without the aid of the instruction given at the instance of plaintiff, its tendency was to minimize in the minds of the jury the real point in issue, that is, the determination of whether the daughter was a member of the household of the defendant when she ordered the machine to be brought down for her service. It put that issue before the jury in the most extremely favorable light possible for the defendant. The defendant cannot complain of it as it was his own instruction and he surely has no ground to complain of it for failing to give him the benefit of his defense.

As to the proposition made by the learned counsel for the defendant, that there is no evidence to support the allegations of negligence on the part of the defendant's employee and that the verdict is excessive, it is to be said that while it is true that there was contradictory evidence to that of plaintiff on the part of the defendant as to the rate of speed and as to the care and caution exercised respectively by the chauffeur and by the plaintiff and also conflicting evidence as to the extent of the injury and damage to the plaintiff, the jury were properly instructed on these matters and the weight to be given to this testimony was entirely within the province of the jury. We see no error to the prejudice of the defendant in the record and do not consider the verdict so excessive as to warrant interference by us on that account. The judgment of the circuit court is affirmed. All concur.

**ELSIE ACKERMANN, Respondent, v. ALBERT C. HAUMUELLER, Admr. of HENRY HAUMUELLER, Deceased, Appellant.**

**St. Louis Court of Appeals. Argued and Submitted March 11, 1910.  
Opinion Filed May 3, 1910.**

1. **GUARDIAN AND WARD: Final Settlement: Conclusiveness.** To disturb the force of a final settlement of a guardian's account, it must be attacked directly, and not collaterally.
2. ———: ———: ———: **Collateral Attack.** An action by a ward against the administrator of the deceased guardian for services rendered the guardian during the continuance of the relation is a collateral attack on the final settlement of the guardian, the judgment in that proceeding being conclusive as to all matters which the probate court might have passed upon therein.
3. ———: ———: **Charge for Services Rendered Guardian by Ward.** Services of a ward rendered to a guardian are assets of the guardianship, claims for which may be adjudicated in the proceedings for the final settlement of the guardian's accounts.

**Appeal from St. Louis City Circuit Court.—Hon. Geo. H. Williams, Judge.**

**REVERSED AND REMANDED (*with directions*).**

*Warren D. Isenberg* for appellant.

(1) A final settlement made in the probate court is equivalent to a final judgment and can be vacated only for the causes for which any other final judgment can be vacated. This would be true of the judgments fixing the appropriation for support which would involve a consideration, necessarily of the earnings of the ward, the amount of the estate, and his position in society, and wants and necessities. *Standard v. Lacks*, 25 Mo. App. 69; *State v. Roland*, 23 Mo. 97; *Barton v. Barton*, 35 Mo. 163; *Boly v. Lake*, 54 Mo. 200; *Sheets*



v. Kirtley, 62 Mo. 417; Miller v. Manger, 67 Mo. 247; Smith v. Sims, 77 Mo. 272. (2) The final settlement can be impeached only for fraud. Jones v. Brinker, 20 Mo. 87; Tourville v. Roland, 23 Mo. 95; Whittelsey v. Dorsett, 23 Mo. 236; Nelson v. Barnett, 123 Mo. 564; Smiley v. Smiley, 80 Mo. 44; Heitkamp v. Biedenstern, 3 Mo. App. 450. Final settlement can be impeached only by direct proceedings in equity to set aside for fraud, begun in the circuit court. State ex rel. v. Grey, 106 Mo. 526; Crowley v. McCrary, 45 Mo. App. 350. (3) The order fixing the allowances was an adjudication by the court considering the earnings and the surroundings and necessities, and covers the whole issue and becomes doubly final after final settlement. Reavis v. Reavis, 135 Mo. App. 199; Camden v. Plain, 91 Mo. 117.

*Alexander R. Russell* for respondent.

(1) The earnings or services of the ward do not constitute guardianship assets and their existence or value are not adjudicated by the final settlement of the guardian. Blancherd v. Illsley, 120 Mass. 558; Heilman v. Martin, 2 Ark. 158; Phillips v. Davis, 2 Sneed (Tenn.) 520; Bass v. Cook, 4 Porter (Ala.) 390. (2) A judgment of a probate court, in the final settlement of curators, administrators or executors, does not conclude matters not actually or properly included in such settlements. 2 Woerner's Am. Administration (2 Ed.), sec. 506; Black on Judgments, sec. 644; Fish v. Lightner, 44 Mo. 270; McPike v. McPike, 111 Mo. 216; Nelson v. Barnett, 123 Mo. 570; Bramell v. Adams, 146 Mo. 70. (3) No one, not even a father, is entitled to the earnings and services of an infant, unless he discharges the duty of a father in maintaining and supporting such infant. Gerber v. Bauerline, 17 Ore. 115; Doremus v. Lott, 49 Hun 284; Ream v. Watkins, 27 Mo. 516; Swift

& Co. v. Johnson, 138 Fed. 867, 1 L. R. A. (N. S.) 1161; Railroad v. Flemister, 120 Ga. 524; Thompson v. Railroad, 104 Fed. 845; McGarr v. Worsted Mills, 24 R. I. 447, 60 L. R. A. 122; McCarthy v. Corporation, 148 Mass. 550, 2 L. R. A. 608; Nugent v. Powell, 4 Wyo. 173, 20 L. R. A. 199; Railroad v. Smith, 93 Ga. 742. (4) The mere fact of consanguinity or the fact of living together under the same roof, or both together, raises no presumption that the head of such family is entitled to the services or earnings of the others. Lillard v. Wilson, 178 Mo. 145; Castle v. Edwards, 63 Mo. App. 564; Moore v. Renick, 95 Mo. App. 202; Truesdail v. Truesdail, 72 Mo. App. 155. (5) As a matter of fact and of law, the deceased did not stand *in loco parentis* toward the plaintiff. Ream v. Watkins, 27 Mo. 516; Vonder Horst v. Vonder Horst, 41 Atl. (Md.) 126; Brinkerhoff v. Marselis, Extr., 24 N. J. L. 633; Marsh v. Taylor, 10 Atl. (N. J.) 488; Capek v. Kropik, 129 Ill. 509; Gerber v. Bauerline, 17 Ore. 115.

STATEMENT.—On the 19th of November, 1891, one Henry Haumueller was appointed general guardian of the person and estate of Elsie Ackermann, who was his granddaughter and at the time of the appointment of her guardian was about five years old. She and a brother, Edwin A. Ackermann, had lived with their grandparents ever since they were very young children. Their exact age is not given at the time of the death of their parents. It appears to have been between three and five years and Elsie appears to have lived with her grandparents before her grandfather was appointed guardian. When the respondent here, plaintiff below, became of age, her grandfather, as guardian, made final settlement of the affairs of his guardianship, having duly advertised, and Elsie executed to him a receipt which is practically a release of all claims against him as guardian. This settlement was made in March, 1904. Henry Haumueller died September 5,

1905, defendant taking out letters and qualifying as administrator of his estate. Shortly afterwards plaintiff presented a demand in the probate court of the city of St. Louis against defendant, as administrator of the estate of Henry Haumueller, in which she demanded an allowance and pay for services claimed to have been rendered by her to her grandfather, Henry Haumueller, as housekeeper, from March, 1900, to October, 1903, inclusive, fourteen months at thirty dollars a month, a total demand of \$1320. Elsie was between thirteen and fourteen years old in March, 1900. It appears from the evidence in the case that during the minority of Elsie there was never any express contract between her and her grandfather to pay her anything for her services but when she arrived at the age of eighteen, by agreement between them, he commenced paying her ten dollars a month; how long he paid her does not appear, but there is no pretense or claim that he owed her anything for services rendered after October, 1903. In the settlement of the accounts of the grandfather as guardian and curator, it is admitted that he took and was allowed credit for ten dollars a month for the care and maintenance of Elsie until she became fifteen years of age, and after that until she arrived at the age of eighteen, he credited himself in his final settlement and was allowed fifteen dollars a month as guardian for her care and maintenance, and it is also admitted that in making his settlements, he had never charged himself or credited his ward for any services. On the hearing on the claim, the probate court allowed plaintiff \$660, classifying it as in the fifth class of demands against the estate of Henry Haumueller. The administrator appealed from this to the circuit court and in that court filed an answer setting up the appointment of Henry Haumueller as guardian and his qualification as such and that Elsie was the granddaughter of Henry and that he acted as grandfather and as guardian in his conduct toward plaintiff until he was finally

discharged as guardian March 7, 1904; and averring that the period for which the compensation for services is now claimed was covered by the final settlement and was part of the period of time during which Henry Haumueller was guardian of Elsie, and it is averred that by reason of the guardianship and the relation of guardian and the final settlement of the accounts of the guardian and acknowledgment of satisfaction and of the correctness of the same, Elsie is now estopped to dispute "in this manner the correctness of said account." That during the time covered by the claim of Elsie, she was a minor and her grandfather was acting as her guardian and she was living with and being cared for as a member of the family of Henry and that Henry from time to time, as guardian of the ward had allowances made for the support and care of Elsie, and it is pleaded "that in having these allowances made the court will be presumed to be and was in full knowledge of all the facts and took into account and will be presumed to have done so, the services, if any, and the value thereof, if any, rendered by said ward to said guardian in fixing the allowance for the care, maintenance and support of said ward." The answer further pleads the settlement and the discharge in bar of this action, alleging that the plaintiff "cannot recover in this suit without first having instituted a suit to set aside the final settlement herein alleged to have taken place." There was a reply to this, generally denying all the averments of fact but at the trial the facts were practically admitted or evidence given tending to prove them. The defendant objected to all testimony, duly saving exceptions, and standing on the plea of the bar raised by the judgment of the probate court in approving the final settlement.

At the conclusion of the evidence the court gave two instructions at the instance of the plaintiff and refused all those asked by defendant. At the close of plaintiff's testimony and at the close of the case, defendant demurred to the evidence and asked for instructions

directing a verdict in his favor which were refused, defendant saving exceptions, and the jury returned a verdict for plaintiff in the sum of \$1100 principal and \$197 interest, a total of \$1297, and judgment went accordingly from which defendant, filing a motion for new trial, which was overruled and exceptions saved, has duly perfected an appeal to this court.

REYNOLDS, P. J. (after stating the facts).—In the view that we take of this case it is unnecessary to examine into the instructions or to set out the evidence any further than we have done. It may be repeated that it was stipulated on the trial as an admission in the case that Henry Haumueller was the guardian of the plaintiff Elsie and that as guardian he had made final settlement of his accounts and had been discharged, and that the period for which services are demanded was embraced within his term as guardian.

Counsel for respondent has submitted a very elaborate and learned brief and argument, a large part devoted to a challenge of the abstract furnished by appellant. The points made against the abstract, as that was originally filed are correct, but subsequent to the filing of the motion and before submission of the cause, appellant inserted in the abstract printed pages covering the omitted recitals. This was done by leave of court and the abstract as presented when the case was submitted was without the defects complained of by the learned counsel for the respondent.

On the merits counsel for respondent make six propositions: First, that a former judgment will not bar a subsequent action between the same parties unless the subject-matter of the two actions be identical; second, the earnings or services of the ward do not constitute guardianship assets and their existence or value are not adjudicated by the final settlement of the guardian; third, the judgment of the probate court in the final settlement of curators, administrators or execu-

tors, does not conclude matters not actually or properly included in such settlements; fourth, no one, not even a father, is entitled to the earnings and services of an infant, unless he discharges the duty of a father in maintaining and supporting such infant; fifth, the mere fact of consanguinity or the fact of living together under the same roof, or both together, raises no presumption that the head of such family is entitled to the services or earnings of the others; sixth, as a matter of fact and of law, the deceased did not stand *in loco parentis* toward the plaintiff. In the view we take of the case the only points necessary to be considered for its determination are the first, second and third. Considering these, not separately nor in the order named, but together, for they all tend practically to one point, it may be conceded that a former judgment will not bar a subsequent action between the same parties unless the subject-matter of the two actions be identical. That, however, does not meet the question presented by this case. The judgment here relied upon by the defendant is a judgment by the probate court on the final settlement of the guardian, approving that settlement and discharging Haumueller as guardian. To disturb the force and effect of that and show that it is not conclusive in the present action, it must be attacked directly and not collaterally as here attempted. The law presumes that a final settlement of a guardian, like that of an administrator, includes all matters relating to the trust, and it allows such judgments on settlements to be attacked and opened up only by direct proceedings to surcharge and falsify or possibly by a bill in equity for fraud, omission or mistake. It is not necessary to determine here what is the appropriate remedy or mode of reaching it, it being sufficient to say, for the purposes of this case, that this present proceeding is a collateral attack; that in this action that judgment must stand as conclusive of all matters which the probate court might have passed

upon in that proceeding. Whether it did pass upon them is a matter that may be disposed of if that judgment is directly attacked. The authorities in this State on that are all one way. The question of whether the account or charges for services could and should have been included in the final or annual settlements depends on the further fact of whether such charges of the ward are proper matters of account by the guardian and as to whether they, as guardianship assets or of the trust for which the guardian is responsible. Counsel for respondent contend that the earnings or the services of a ward do not constitute guardianship assets and their existence or value are not to be adjudicated by the final settlement of the guardian. They cite in support of this *Blanchard v. Ilsley*, 120 Mass. 487; *Heilman v. Martin*, 2 Ark. 158; *Phillips et al. v. Davis et al.*, 2 Sneed (Tenn.) 520; *Bass v. Cook*, 4 Port. (Ala.) 390.

*Blanchard v. Ilsley* can hardly be considered in point. It was an action for seduction and the question was whether the guardian as against the father was entitled to the services of the daughter. The court held that in a case of that kind the right of action was in the father and not in the guardian. In the subsequent case of *Shurtleff v. Rile*, 140 Mass. 213, which was an action on the guardian's bond, the Massachusetts Supreme Court held that in settling the guardians accounts and in determining his liability on his bond, the question of the value of the services was properly to be considered.

In *Heilman v. Martin* it is true that the Supreme Court of Arkansas held that the guardian and his sureties were not liable on the former's bond, deciding it, however, on the terms of the bond itself. But this can hardly be considered a determination of the proposition, because the court found that the party claiming to be guardian had never been legally appointed as such and that the bond given was void. We cannot, therefore,

consider this as an authoritative decision of any point before the court, but as *dicta*. But whether *dicta* or in decision, it is practically overturned by the decision of the Supreme Court of that state in the later case of *Campbell v. Clark*, 63 Ark. 450, 39 S. W. 262, a suit in equity to surcharge and correct the final settlement of the guardian. In this latter case it was held that when the ward lived with the guardian as a member of his family, receiving support on the one hand and on the other rendering ordinary household services required by parents of their children, such services will be presumed, in the absence of a clear showing to the contrary, to be a sufficient compensation for the board of the ward. In support of this the Supreme Court of Arkansas cite many cases, among others *Folger v. Heidel*, 60 Mo. 285.

In *Phillips et al. v. Davis et al.*, it was held, in a bill in equity against the guardian and his sureties on his bond to enforce settlement by the guardian, that the guardian's charges for clothing, etc., and the children's claim to offset these for services and labor, were not properly to be considered in an action of that kind and that the sureties of the guardian were not liable on the bond for the services of the children. That does not meet this case.

In *Bass v. Cook* it is true that the Supreme Court of Alabama held that in a settlement of the guardian's accounts, an allowance would not be made in favor of the ward for services as an offset to charges for clothing and maintenance. But in *Calhoun v. Calhoun*, 41 Ala. 369, an appeal from the judgment of the probate court on the final settlement of a guardian's accounts, the court held that credits for services rendered were proper matters of account. So that we think that the weight of authority, particularly in the more modern decisions, as shown in case after case, involving the settlement of guardians and administrators, as well as the views of accepted textwriters, conclusively deter-



mine that whether in the course of passing upon the settlement itself or in proceedings to surcharge and falsify, or in equity to compel the administrator or guardian to make settlement, it appears that these matters of charges of maintenance and support as well as claims for wages and services have been considered and properly are adjudicated, and are treated as matters falling directly within the settlement of guardians with their wards. We think this will appear by reference to a few of the cases, in addition to those to which we have before referred.

In *Armstrong's Heirs v. Walkup et al.*, 12 Gratt. (Va.) 608, which was a bill in equity for minors against their guardian for an accounting and settlement, the Virginia court took into consideration the question of services and labor performed in determining the liability of the guardian of the minors.

In *Beam's Appeal*, 96 Pa. St. 74, which was an appeal from a judgment of the Orphans' Court upon exceptions to a guardian's settlement, the respective charges for support as against labor and services were considered proper matters of account.

*Montgomery v. Givhan et al.*, 24 Ala. 568, was a bill filed against the defendant to compel settlement of the estate of which he was executor as also guardian of plaintiff, and in that case the charges for support and maintenance were allowed to be offset by claims for services and labor performed by the ward.

In *re Succession of Gross*, 23 La. Ann. 105, where exceptions to the final settlement of the tutor were before the court, it was held that charges made by the tutor for the ward for support and maintenance were offset and their allowance denied because it appeared that the ward had rendered services equal in value to the amount claimed.

In the Tutorship of the Minor Heirs of Hollingsworth, 45 La. Ann. 134, following *Hebert v. Hebert*, *Manning's Unreported Cases* 214, both proceedings on

the settlement of the accounts of the tutor, as the guardian is called in Louisiana, it was held proper to consider, as offset to the claims for maintenance and support, the value of labor and services performed by the ward.

In *Moyer v. Fletcher*, 56 Mich. 508, on approval of the final settlement of the guardian it was held that it was proper to take into consideration as an offset to the claim for support which had been made by the guardian, the value of the services and labor performed by the ward. This was approved in the case of *In re Estate of Mabel Ward*, 73 Mich. 220, l. c. 231.

In *re Estate of Livernois*, 78 Mich. 330, which was an appeal from an allowance to the guardian made by the probate court on final settlement, the Supreme Court of Michigan held that charges for support should be offset by value of services rendered by the ward.

*Marquess v. La Baw*, 82 Ind. 550, was a suit to set aside the annual and final settlements of the guardian. It was held that the guardian should be charged for the services rendered by the ward when he charged for board.

In *Haydon v. Stone*, 1 Duvall's Rep. (Ky.) 396, which was a suit in equity to compel the guardian to account, claims for labor and services were among the matters involved and alleged to be unaccounted for, and of which the court took cognizance.

In *Clement v. Hughes*, 13 Ky. L. Rep. 352, s. c. 17, S. W. 285, an action on the guardian's bond, it seems that items of services rendered were considered to be properly taken up in the settlement.

In *Simon's Appeal*, 19 W. N. C. 94, s. c. 8 Atl. 34, a proceeding instituted in the Orphan's Court to compel the administrator and guardian to file accounts of guardianship, the Supreme Court of Pennsylvania held that in stating the guardian's account items of value of services rendered were properly taken into consideration. All these cases treat the matter of claims for

services rendered by the ward as matters falling within the guardian's settlements.

That wages earned by the ward and coming into the hands of the guardian are of the trust estate, seems to be well established. In *Bannister v. Bannister*, 44 Vt. 624, l. c. 627, it is said: "The whole theory of statutory guardianship of property assumes the incompetency of the ward to take care of and deal with his own property, to as great an extent, at least, as the common law assumes the incompetency of a minor to bind himself by contract." This statement was made in the determination of an appeal from the probate court on its judgment in the settlement of the guardian's account.

In *Haskell v. Jewell*, 59 Vt. 91, which was an action of debt on a judgment rendered by the probate court which it appears is the mode for enforcing payment of an amount found due on a settlement of the guardian with his ward, Judge WALKER, speaking for the Supreme court of Vermont (l. c. 93), says: "It is contended by the defendant that the county court" (to which the appeal had been taken from the probate court and from the county court to the Supreme Court), "was in error in holding upon the facts disclosed by the case that the defendant held money of the ward in his hands in trust or in a fiduciary capacity; and it is also contended by the defendant that the judgment of the probate court was simply for the debt which the defendant owed for the labor of his ward, and not for money or property held in trust or in a fiduciary capacity.

"We think this contention of the defendant cannot be maintained. It is unquestionably true, when the matter is considered in the ordinary sense of the term, and in view of the usual relations of debtor and creditor, that the defendant was the debtor of his ward for the work performed by him for the defendant during the time he was his guardian. But the law, in the matter of a guardian's indebtedness to his ward, wisely treats the debt of the guardian to his ward as paid to him in

his representative capacity, and as so much money of the ward in his hands as assets *de facto*, to be accounted for like other assets, because he cannot sue himself for the debt, or collect if of himself, as he could a debt due the ward which he holds against another person. Wages earned by the ward in the employ of his guardian, before and after his appointment, if unpaid, are universally held to be money assets in the hands of the guardian, and regarded in the law the same as money or other property received by the guardian for the ward from any other source, and as so much money of the ward in his hands at the time such debt for work became due, and he must account for it as such. This legal fiction of payment arises from the peculiar relations of the guardian and ward, and is adopted not only from considerations of policy, but for the purposes of justice and protection of the ward's estate. [Kinney v. Ensign, 18 Pick. 232; Tarbell v. Jewett, 129 Mass. 457; Lyon v. Osgood, 58 Vt. 707.]

"It follows therefore, that whatever sum was due from the defendant as guardian to his ward for wages, was money assets of the ward in his hands, of which he had control, and which he was bound to use and exercise for the benefit of the ward. His relation to and power over the assets necessarily made him the holder of the same as money held in trust or in a fiduciary capacity." The court also cites and quotes from the case of David v. Leahey, In Re, 58 Vt. 724, as deciding that money held by an administrator as assets of an estate is held in trust or in a fiduciary capacity and that the guardian sustains the same relation to the money of the ward in his hands as an administrator does to the money assets of an estate in his hands.

The Supreme Court of Alabama, in Kyle v. Barnett, 17 Ala. 306, where the ward sued his guardian in equity for settlement and to account in his settlement for profits, wages, etc., due the ward, held practi-

cally as had the Supreme Court of Vermont in the Haskell case, *supra*.

In 15 Am. and Eng. Ency. of Law (2 Ed.), p. 97, par. 5, the general doctrine is stated to be that for such reasonable labor as is incident to the ward's training in habits of industry or to his position in the guardian's family, the guardian is not liable to account to him; but if the labor entirely or partially compensated the guardian for the board furnished, it should be taken into account in fixing the allowance for such board and if the ward regularly works for the guardian so as to earn substantial wages, no doubt the guardian will be held liable to pay him therefor. In note 7 to this paragraph, under the title, "Ward's Labor Considered in Fixing Allowance for Board," cases are cited from Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Tennessee and Pennsylvania. We have examined all of these, quoting some of them above as sustaining the proposition to which they are cited; citing and quoting from a few of them only, to illustrate the proposition that matters of account for work and labor done and performed by the ward while in charge of the guardian are matters to be accounted for and taken up in an adjustment of the accounts and settlement of the guardianship in his dealings with the estate of the ward.

Schouler, Domestic Relations (5 Ed.), sec. 320, lays it down as a rule beyond question that the guardian of the estate of the minor, among other duties, collects the ward's dues "and is, in effect, the ward's trustee." Further along, however, he qualifies this to some extent by saying that the guardian's interest is not "precisely like that of trustees; for while the latter may sue and be sued in their official capacity, suits by and against infants are brought in the name of the ward and not the guardian." At section 321 of the same work it is said that guardians appointed under proper laws by the probate courts, like testamentary guardians, are more

like trustees. So far as the estate of the ward is concerned the guardian is in fact the trustee; "for he holds the legal estate for the benefit of another." At section 335, the text writer says: "The guardian has not the same right as a father to the personal services of the infant, where he does not undertake to stand *in loco parentis*, which he sometimes does. For as his duty to educate and maintain is limited by law to the ward's resources, and is not, like the responsibility of a parent, absolute, so his rights are those of a representative, who should seek to add to the trust fund in his hands, and not to his own private emolument."

There are in our State no authorities directly in point on the proposition here under consideration. But in all the cases that we have been able to find the same rule is recognized—that is, that on settlement of accounts of guardians, the value of the services of the ward is proper matter for consideration in connection with the guardian's settlements.

In *Bombeck v. Bombeck*, 18 Mo. App. 26, a controversy growing out of a citation issued by the probate court of Buchanan county to the defendant, as guardian and curator of the plaintiff, to appear before the probate court and make settlement, it was held that where a person occupying a position of curator had made collection of money belonging to the ward, even after the termination of the relation of guardian, he should be charged as guardian, it being held that notwithstanding the majority of the ward the probate court had jurisdiction to compel the guardian to make final settlement and to render judgment against him for the balance found in his hands.

In *Gillett v. Camp & Wife*, 27 Mo. 541, it is held that the matters of charges between guardian and ward for allowance for support and credit for services must be settled in the probate court; that the guardian's accounts should be settled in that court and that any ap-

plication for allowance and any offsets growing out of it must be included in the settlement.

In *State to use of Hermann v. Miller*, 44 Mo. App. 118, which was an action on the guardian's bond, the decisions up to that time are collected with great fullness as adjudications on the relation of guardian and ward and they all tend to the conclusion that these matters of wages, services, maintenance and support are all matters to be considered in the settlement of the estate by the guardian with his ward.

In *May v. May*, 189 Mo. 485, 88 S. W. 75, the court in a partition proceeding, passing upon the effect of an order on the final settlement of the curator, holds it shall be conclusive and a bar to the further examination of the correctness of the guardian's accounts "as to all matters the proper subject of account included in such settlement and involved in the final settlement." The settlement there referred to was held not to be a final one and hence open to collateral attack. But even at that it appears that the ground of attack of these annual settlements was failure to embrace credits to which the ward claimed she was entitled. The law being thus, we are of the opinion that the only manner in which plaintiff can have the matter here involved determined is by direct proceeding attacking this settlement, as by proceedings to surcharge and falsify the annual and final settlements, or otherwise. In no other manner can the matters here sought to be litigated be reached. In an appropriate proceeding the question as to how far the judgment on the settlement is conclusive, how far that judgment is a bar, how far the guardian, under the facts in the case, can be held liable for services, can all be settled. None of this can be done in this present proceeding, which, in effect, is a collateral attack upon the judgment approving the final settlement of Henry Haumueller as guardian. The judgment of the circuit court is reversed and the cause remanded with directions to that court to certify to

the probate court a dismissal of plaintiff's claim; this without prejudice to the right of the plaintiff to prosecute any other action on that claim which she may deem advisable. All concur.

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**JOHN HARVEY O'CONNELL, Admr. of KATE O'CONNELL, Deceased, Appellant, v. MERCANTILE TRUST COMPANY, Defendant; ST. LOUIS TRANSIT COMPANY et al., Respondents.**

**St. Louis Court of Appeals. Argued and Submitted April 5, 1910.  
Opinion Filed May 3, 1910.**

1. **APPELLATE PRACTICE: Dismissal of Appeal: Failure to Preserve Exceptions.** Since, without any bill of exceptions, the Court of Appeals, with the record proper before it, is bound to look into the case to determine whether there is error on the record proper, and on that conclusion affirm or reverse, it is no ground for dismissal of an appeal or writ of error or for affirmance that the bill of exceptions has not been filed or exceptions saved to the overruling of a motion for a new trial.
2. **PLEADING: Judgment on Pleadings: Issues of Fact.** Where a sum of money was deposited with a trust company to protect a purchaser from the depositors against judgments against them, and, in an action to recover the deposit, a holder of one of the judgments pleaded the judgment and its assignment, to which the depositors pleaded the invalidity of the judgment and that it was barred by limitation, it was error to render judgment on the pleadings in favor of the holder of the former judgment without an examination of the facts.
3. **PARTIES: Necessary Parties: Interpleaders for Fund.** Where under an agreement, a sum of money was deposited to protect a purchaser from judgments outstanding against the depositors, all of the judgment creditors named in the agreement were necessary parties to an action by the depositors to recover the same, and where part of them were not served either personally or by publication, it was error to render judgment for payment of a part of the fund to the other creditors, leaving the balance undisposed of by the judgment.



4. **HUSBAND AND WIFE: Wife's Separate Property: Contract to Pay Judgment: Construction.** Where a husband and wife deposited funds with a trust company to secure purchasers of land against outstanding judgments against the depositors, the fact that said land belonged to the wife, while one of the judgments referred to in the agreement of deposit was against the husband alone, would not affect the right of the owner of such judgment to recover a sufficient amount under the agreement to pay his judgment, if valid and otherwise unpaid, since by that contract the wife made herself responsible for the payment of the judgments mentioned in it.

Appeal from St. Louis City Circuit Court.—*Hon. Robt. M. Foster*, Judge.

REVERSED AND REMANDED.

*Thos. Morris* for appellant.

The pleadings of the interpleaders, either and both, will not sustain a verdict for the following reasons: The pleadings fail to show a transcript of a judgment from the justice's court or the circuit court. This applies to both interpleas. The interplea of Jared W. Young fails to show that the judgment was filed in the circuit court by Annie Haliburton and fails to show that it was ever revived. The interplea as to the St. Louis Transit Company shows that its judgment, if such exists, is against Patrick O'Connell. All the papers in the case, and especially the written agreement with the defendant Mercantile Trust Co., show that this \$1000 is part proceeds of the sale of the separate estate of Kate O'Connell. *Hoffman v. Buchanan*, 123 S. W. 168; *Fields v. Florence*, 123 S. W. 187; *Singleterry v. Goeman*, 123 S. W. 436; *Carpenter v. King et al.*, 42 Mo. 219.

*Boyle & Priest* and *George T. Priest* for respondent, Transit Co.

*R. L. McLaren* for respondent, Young.

STATEMENT.—On the 13th of September, 1904, Kate O'Connell and Patrick O'Connell entered into the following agreement with the Mercantile Trust Company:

"Whereas, Charles C. McCloskey, as trustee of Kate O'Connell, and Kate O'Connell and Patrick O'Connell, her husband, for themselves, are about to convey to Herman Gilbert and William G. Stohlman certain real estate situated in the city of St. Louis, Missouri, by deed dated the 18th day of August, 1904, which said real estate is described as follows: Lots numbered (12) twelve and thirteen (13) in block number two (2) of Thomas F. Smith's First Addition to the city of St. Louis and in city block numbered seventeen hundred and thirty-two (1732), said lots having together a front of fifty (50) feet on the southern line of Manchester avenue by a depth southwardly between parallel lines of one hundred and (120') twenty feet to the northern line of Walnut street, on which said lots have also an aggregate front of fifty (50') feet, bounded on the north by Manchester avenue, on the south by Walnut street, on the east by lot number fourteen (14), and on the west by lot number eleven (11) of said block and addition, together with the improvements erected thereon. The deed is made subject to a deed of trust mentioned in said conveyance, and, whereas, there exist against the aforesaid Kate O'Connell and Patrick O'Connell certain judgments as follows:

"A judgment in favor of Annie Haliburton of date July 31st, 1899, for possession of \$150.00, damages \$150.00, abstracted November 2, 1901, which said judgment has been assigned to Jared W. Young.

"A judgment against Kate O'Connell in favor of Henry Palmer, dated July 31st, 1898, for possession

\$15.00, damages \$20.00, abstracted November 2, 1901.

"A judgment against Kate O'Connell, surety, in favor of Minnie Slevin, dated January 8th, 1902, for \$32.35, abstracted March 20th, 1902.

"A judgment against Pat O'Connell, surety, in favor of the St. Louis Transit Co., dated March 4th, 1902, for \$52.95, abstracted September 26th, 1902.

"All of which judgments were rendered in the city of St. Louis, and are recorded in the circuit court of the city of St. Louis, Missouri; and, whereas, it is the desire of the said Kate O'Connell and Patrick O'Connell to protect the purchasers of the property in question, namely, Herman Gilbert and William G. Stohlman, against any liens or liability on account of said judgments:

"Now, therefore, in consideration of the premises the said Kate O'Connell and Patrick O'Connell have deposited with the Mercantile Trust Company of the city of St. Louis, Missouri, the sum of one thousand dollars (\$1000.00), which said sum is to remain on deposit with said company for a period ending on the 18th day of August, 1907, unless in the meantime the said judgments, together with all costs, interest and damages thereunder have been fully paid and satisfied of record. Should the said Kate O'Connell and Patrick O'Connell, prior to the 18th day of August, 1907, pay and satisfy the judgments above set forth and all of them, then the said sum of one thousand (\$1000.00) dollars is to be returned to them. But if the said judgments or any of them have not been so paid and satisfied then the Mercantile Trust Company shall, at the time named, the 18th day of August, 1907, proceed to pay all of said judgments or any which then exist, together with all property interest, costs and damages; and after the payment of said judgments, costs, interest and damages shall repay the balance to said Kate O'Connell, and the Mercantile Trust Company shall have reasonable compensation for its review hereunder. In witness whereof,

the said Kate O'Connell and Patrick O'Connell and the Mercantile Trust Company have hereunto set their hands, and the Mercantile Trust Company has caused its name to be signed and its seal attached this 13th day of September, 1904.

“(Signed.)

KATE O'CONNELL,

“PATRICK O'CONNELL,

“MERCANTILE TRUST CO.,

“By

“Trust Officer.”

Subsequently Kate and Patrick O'Connell died, and John H. O'Connell was appointed administrator of Kate's estate. This administrator instituted this action against the Mercantile Trust Company to recover from it the one thousand dollars, alleging in his petition that so far as he is aware there was only one claim purporting to be a judgment against the estate of Kate O'Connell and that on that being presented for payment it was declared to be void; that the defendant Mercantile Trust Company had not paid any claims or judgments out of the fund of one thousand dollars chargeable against the estate of Kate O'Connell, but has the said sum to the credit of the estate and that it is due and payable to plaintiff as administrator of Kate O'Connell. Averring demand of the one thousand dollars from the Trust Company and that it had not been paid, he prays for judgment for that amount and costs. It is further averred in the petition that at the time of making the above agreement, Kate O'Connell was a married woman and owned the property referred to in the agreement in her own right and had sold it through the agency of the Mercantile Trust Company and at the time of the sale she and her husband were obliged to sign the agreement above set out. The defendant Mercantile Trust Company, hereafter referred to as the Trust Company, answered, setting up that it held the one thousand dollars under the agreement above set out, which amount it offered to pay into court. It further avers by way of

cross-bill and bill of interpleader, that the one thousand dollars had been claimed of it by Patrick and Kate O'Connell in their lifetime and by the administrator of Kate, plaintiff herein, after her death; that it, the Trust Company, has also been notified by Jared W. Young, "mentioned in said agreement as being the assignee of a judgment in favor of Annie Haliburton," that the judgment has not been paid and is still in force and demanded payment thereof from the Trust Company, but that Patrick and Kate O'Connell during their lifetime, and the plaintiff, as Kate's administrator, after their death, had notified the Trust Company not to pay the judgment, because, as they claimed, the judgment was void; that it had been requested and demanded of it by Henry Palmer and by Minnie Slevin and by the St. Louis Transit Company, that it pay the amounts of their several judgments out of that fund to them and that it had been notified by the O'Connells and the administrator not to pay the same to any of them because they claimed that the judgments were satisfied or void, and that the parties named in the agreement had notified the defendant Trust Company that they intended to institute suit against it unless payment thereof was made, but that they have refrained from bringing said suits upon the assurance of defendant that it would pay the money into court and file a bill of interpleader against the plaintiff and the parties respectively for the purpose of enabling the parties to assert their right to the fund. Averring that it holds the fund for the purpose of paying over the same to whoever it belongs and that it is unable to determine the respective rights of the parties, it asks the court to require them to interplead and to assert their claims to the fund. The court accordingly ordered the issue of the summons to these parties to answer and interplead. Jared Young answered, claiming about five hundred dollars of the fund by virtue of the judgment referred to which was in replevin and against Kate O'Connell and the Fidelity

& Deposit Company of Maryland, surety on the replevin bond. The answer of Young further avers that at the time the agreement was made the judgment referred to in the agreement was in force and had been assigned to him, and setting out the agreement, asks that the amount of that judgment, interests and costs be paid over to him. The plaintiff answered this interplea of Young, setting up that in the replevin suit, which it seems was by one Pratt against Annie Haliburton and others, and that in it the Fidelity & Deposit Company of Maryland and Kate O'Connell had signed the bond of the plaintiff Pratt in that case, and that the issues in it were determined in favor of Haliburton. It is then alleged that the Fidelity & Deposit Company of Maryland, as one of the sureties on the bond, through Young, who, it avers, was its agent and servant and who is the interpleader herein, settled with Annie Haliburton, who thereupon assigned her judgment to Young; that afterwards Young, in his own name, as assignee of this judgment, "filed a citation and affidavit" in the justice's court to revive the judgment; that the justice entered up a judgment of revival against Kate O'Connell; that Kate O'Connell appealed from this judgment and in that appeal the case was dismissed by the circuit court for want of jurisdiction; that afterwards Young filed a suit in the probate court which resulted in a judgment in favor of Young against the estate of Kate O'Connell for the amount of the judgment; that the administrator, the present plaintiff, appealed from the judgment of the probate court allowing the claim founded on the judgment of the justice, but when the case was called for trial, Young dismissed it. It is further averred, on information and belief, that Young, the interpleader, has no interest whatever in the cause or judgment, and that the real party in interest is the Fidelity & Deposit Company of Maryland; it avers that the judgment entered up by the justice in favor of Annie Haliburton the 31st of July, 1899, has never been re-

vived in the name of Annie Haliburton against Kate O'Connell or against her estate, either in the name of Annie Haliburton or in the name of any person as assignee since the date of the judgment. Plaintiff also pleads the Statute of Limitations as against the judgment or its allowance in this case, and avers that it is void and of no effect in favor either of Annie Haliburton or in favor of any assignee, as against the estate of Kate O'Connell, deceased. The Transit Company set up the judgment in its favor, referred to in the agreement, and claimed that it had not been paid and claims that there is due \$52.95 out of the one thousand dollars deposited. Answering this interplea the plaintiff sets up that the property out of which this one thousand dollars transaction arose belonged to Kate O'Connell, title being vested in her through a trustee and that her interest in it was not responsible for the debts of her husband, and that the money held by the defendant was payable to Kate O'Connell, deceased, and not to her husband, and the estate of Kate is not responsible for any of the debts contracted by Patrick O'Connell during his lifetime. No service was had upon Minnie Slevin or Henry Palmer, the sheriff returning as to them that they were not found. When the case came for trial, the counsel for the St. Louis Transit Company and for Jared Young moved for judgment on the pleadings, announcing that they had no evidence to introduce. Plaintiff introduced none and the court sustained the motion, rendering this judgment:

"Now at this day this cause coming on for hearing, comes the plaintiff by attorney, and comes also the St. Louis Transit Company and Jared W. Young, interpleaders herein, by their respective attorneys, but the interpleaders Henry Palmer and Minnie Slevin come not. Thereupon said interpleader Jared W. Young and the St. Louis Transit Company submit this cause to the court on the pleadings, and the court having duly considered the same, doth find that the interpleader St.

Louis Transit Company is entitled to the sum of seventy-four dollars and forty cents, and that interpleader Jared W. Young is entitled to the sum of five hundred fourteen dollars and ninety-four cents, of the fund heretofore paid into court by the defendant herein.

"It is therefore ordered and adjudged by the court that the clerk of this court pay over to said St. Louis Transit Company the said sum of seventy-four dollars and forty cents, and to said Jared W. Young the said sum of five hundred and fourteen dollars and ninety-four cents, as such interpleaders, and that the plaintiff pay the costs of this proceeding and execution issue therefor."

This is the only judgment entered in the case. In due time plaintiff filed a motion for new trial as also one in arrest, both of which were overruled, plaintiff duly saving exceptions to the overruling of the motions, as appears by the transcript on file, and in due time filed its bill of exceptions and perfected appeal to this court.

REYNOLDS, P. J. (after stating the facts).—The St. Louis Transit Company has filed a motion to dismiss plaintiff's appeal and to affirm the judgment of the court below because it does not appear from the abstract of the record filed by appellant that there was any order of record made by the court below allowing appellant's bill of exceptions or any entry of record showing that plaintiff's bill of exceptions was filed or that plaintiff's affidavit for appeal was allowed by the court "by any order of record." The abstract is somewhat faulty in the way in which these matters are shown, but they appear sufficiently to warrant us in looking to the transcript itself and doing that, we find that exceptions were properly saved, bill of exceptions duly tendered and filed and the proper affidavit for appeal made and the order granting the appeal entered of record. The motion must therefore be overruled. As this matter comes up



so often before us, it is well to call attention of counsel to the fact that whether a bill of exceptions is filed is not material in determining the question as to whether we should dismiss the appeal or affirm. Even without any bill of exceptions, with the record proper before us, we are bound to look into the case to determine whether on that record proper there is error and on that conclusion affirm or reverse. But it is no ground for dismissing an appeal or writ of error or for affirming, that the bill of exceptions has not been filed in the case or exceptions saved to the overruling of a motion for new trial. We state this here because it comes up so very often that counsel seem to have overlooked the matter.

As to the case itself, the judgment of the circuit court in favor of the St. Louis Transit Company is correct. So far as concerns the judgment in favor of Jared Young, assignee of Annie Haliburton, the issue raised on the interplea of Young by the answer of plaintiff presented issues of fact as well as of law and it was error in the circuit court to render judgment in favor of Young on mere motion without examination into the facts. Moreover Slevin and Palmer are necessary parties. There can be no determination of this question in their absence of the complete disposition of the fund. If they are not to be found within the state, they must be brought into court by publication on proper affidavit of non-residence. The decree makes no disposition of the whole fund. It awards about six hundred dollars to Young and the Transit Company, and leaves about four hundred dollars in court and undisposed of. This is error.

It is earnestly insisted by counsel for appellant that as the property involved in the agreement between Mrs. O'Connell and her husband on the one part and the Trust Company on the other was the sole and separate estate and property of Mrs. O'Connell, that she could not bind it for payment of the debts of her

husband. That is foreign to the issue in this case. The determination of this case must depend upon the construction of the contract pleaded. By that contract Mrs. O'Connell has chosen to make herself responsible for the payment of the judgments mentioned in it. Whether they are judgments against her or against her husband or against both of them, or against any one else is immaterial. She is bound for them by this contract as long as they are unsatisfied and have not been paid by her, her husband or any one for them, or if paid by the Mercantile Trust Company, provided they are existing obligations, and that company is entitled to deduct from the fund the amount, if any, paid thereon, assuming that at the time of that payment, they were valid and subsisting judgments.

Accordingly the judgment is reversed and the cause remanded for proceedings in accordance herewith after all of the parties have been brought in on proper service. As to the St. Louis Transit Company, on final determination of the case, the judgment heretofore entered in its favor should be re-entered, along with a proper judgment disposing of the whole fund and all the parties in order that this matter may be disposed of as to all the intervening parties and the fund itself by one judgment. All concur.

EDWIN ACKERMANN, Respondent, v. ALBERT C. HAUMUELLER, Admr. of HENRY HAUMUELLER, Deceased, Appellant.

St. Louis Court of Appeals. Argued and Submitted March 11, 1910. Opinion Filed May 3, 1910.

**GUARDIAN AND WARD: Final Settlement: Conclusiveness:** Collateral Attack. Where the claim of a ward for wages received while working for others and turned over to the guardian was not included in the final settlement of the guardian, the judgment approving the settlement must be attacked directly, and not collaterally, as by an action by the ward against the administrator of the deceased guardian.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. H. Williams*, Judge.

REVERSED AND REMANDED (*with directions*).

*Warren D. Isenberg* for appellant.

*Alexander R. Russell* for respondent.

REYNOLDS, P. J.—The facts in this case as to the guardianship, settlement and discharge of the guardian are the same as in that of Elsie Ackermann against the same defendant, the difference, however, being that the claimant, a grandson of Henry Haumueller, presents for allowance against the estate of his grandfather, who was also his guardian, an account for wages received and earned by him while working for others, and which he had turned over to his grandfather while guardian. The same points made by counsel in the former case are made in this and the arguments are identical, the two cases being argued and submitted together. We have stated in the opinion filed in that case of Elsie Ackermann against this defendant, the law which we think also covers this case and by which these wages

turned over to the guardian, are held to be of the estate of the ward, and should have been taken up and accounted for as of the assets of the estate, as of the trust fund in the hands of Henry Haumueller as guardian, and as of the funds of the ward's estate and should have been included in the settlement made by the guardian. If it is true that they were not included in that settlement, the judgment approving it must be attacked directly and cannot be attacked collaterally, as is sought to be done here. For the reasons stated in the case of Elsie Ackermann against this same defendant, the judgment of the circuit court is reversed and the cause remanded to that court with directions to certify to the probate court a dismissal of the plaintiff's claim; this without prejudice to the right of the plaintiff to bring and prosecute any other action on that claim that he may deem advisable. All concur.

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EUGENE G. DEAN, Respondent, v. TOLEDO, ST. LOUIS AND WESTERN R. R. COMPANY, Appellant.

St. Louis Court of Appeals, May 3, 1910.

1. **COMMON CARRIERS: Carriage of Freight: Perishable Goods: Presumption of Good Condition: Evidence.** Goods delivered in good order to an initial carrier are presumed to continue so until they get into the possession of the final carrier, even though they are perishable.
2. **———: ———: Injury In Transit: Damages: Difference In Market Price at Destination.** In an action against a carrier for damages sustained en route to a shipment of goods, the for damages sustained en route to a shipment of goods, an instruction on the measure of damages setting two markets, that at the point of shipment and that of the destination, is erroneous.

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Dean v. Railroad.

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3. ———: ———: ———: ———: Freight Charges. A shipper, whose peaches were injured in transit, was liable in an action against the carrier for damages, for at least the freight charges on so much of the carload as he received, though not liable for charges on the damaged part of the peaches.
4. JUDGMENT: Res Judicata: Pleading. A plea of *res judicata*, which does not plead a final judgment, but one merely of dismissal and for costs, is insufficient.
5. ———: ———: Nonsuit. A judgment of nonsuit, taken either voluntarily or by the action of the court, is a mere dismissal of the cause, and not a judgment that can be pleaded in bar of any subsequent action between the same parties on the same subject-matter.
6. COMMON CARRIERS: Carriage of Freight: Injury in Transit: Evidence: Admissions by Agent. In an action against a railroad for injury to goods in transit, a letter from defendant's freight agent to plaintiff, rejecting the latter's claim for damages and referring to the icing of the car as shown by an agent's reports, was not hearsay, but was admissible as an admission by the agent in the course of his duty.
7. INSTRUCTIONS: Refusal: Not Relevant to Issues. An instruction, not relevant to any issue raised, is properly refused.
8. COMMON CARRIERS: Carriage of Freight: Injury in Transit: Pleading: Defenses. In an action against a railroad for injury to peaches in transit, defendant, if it wished to avail itself of the defense that the contract of shipment only required the icing of the car at a certain point designated by plaintiff, should have invoked the provision of the contract by which plaintiff was claimed to have directed the icing of the car, and alleged obedience to his directions.
9. APPELLATE PRACTICE: Waiver of Error. Errors in the trial of a cause may be waived by counsel for appellant on the oral argument in the appellate court.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

*James R. Van Slyke* and *George P. Greenhalgh* for appellant; *Clarence Brown* and *Chas. A. Schmettau* of counsel.

(1) The rule that goods delivered in good order to an initial carrier, are presumed to continue so until

they get into the possession of the carrier which delivers them at the place of destination in a damaged condition cannot apply to highly perishable property. *Flynn v. Railroad*, 43 Mo. App. 424; *Hull v. St. Louis*, 138 Mo. 618; *Lin v. Railroad*, 10 Mo. App. 125; *Crouch v. Railroad*, 42 Mo. App. 248; *Sweatland v. Railroad*, 102 Mass. 276. (2) The carrier is not responsible for loss of goods where shipper has been negligent, unless said carrier's negligence is the sole and direct cause of said loss. *Pratt v. Railroad*, 102 Mass. 557; *Ross v. Railroad*, 49 Vt. 364. (3) In case of a loss of goods the market value must be determined at one market and apply to goods in good condition, at that one market. *Heib v. Railroad*, 16 Mo. App. 362; *Hendrick v. Railroad*, 170 Mass. 44. (4) Plaintiff must prove specific acts of negligence alleged, by a preponderance of the evidence. *Chitty v. Railroad*, 148 Mo. 75; *McManamee v. Railroad*, 135 Mo. 447; *Terry v. Railroad*, 162 Mo. 96; *Waldhier v. Railroad*, 71 Mo. 514; *Price v. Railroad*, 72 Mo. 414; *Coupland v. Railroad*, 61 Conn. 531. (5) The court erred in giving instruction No. D-3, for the reasons set forth in specification of error No. 4, and for the further reason that it misled the jury on the question of contributory negligence. (6) There was no competent evidence that defendant failed to re-ice car No. 3047. *Keff v. Railroad*, 32 Kan. 263; *Morrison v. Construction Co.*, 19 Am. R. R. Rep. 312; *Express Co. v. Perkins*, 42 Ill. 459. (7) From the only information obtained from the G. R. & I. R. R., *i. e.*, the way-bill, appellant had a right to rely on a special contract which only called for icing at Frankfort, Ind. *Witting v. Railroad*, 101 Mo. 631; *Otis Co. v. Railroad*, 112 Mo. 622; *George v. Railroad*, 57 Mo. App. 363; *Hurst v. Railroad*, 117 Mo. App. 25. (8) Plaintiff must show not only a market, but also a market value. *Davis v. Railroad*, 89 Mo. 340; *Nickey v. Railroad*, 35 Mo. App. 79. (9) Plaintiff must prove by the greater weight of the evidence specific acts of negligence alleged. *Milling Co. v.*

Lime Co., 122 Mo. 275; Witting v. Railroad, 101 Mo. 631; Galn v. Railroad, 87 S. W. 1015. (10) If the shipper's packing or loading is part of the legal cause of loss of property he cannot recover. Railroad v. Richardson, 41 L. J. & C. P. 60; Barbour v. Railroad, 34 L. T. N. S. 67; Goodman v. Oregon Retc. Co., 22 Ore. 14; Shriver v. Railroad, 24 Minn. 506; Klauber v. Express Co., 21 Wis. 21. (11) The only duty upon appellant, under the contract, was to re-ice at Frankfort, Ind. Clark v. Railroad, 64 Mo. 446; McFadden v. Railroad, 92 Mo. 348. (12) The court erred in refusing to give instruction D-5, because it properly states the law with reference to contributory negligence on the part of the shipper. Snow v. Railroad, 109 Ind. 422; Tuggle v. Railroad, 62 Mo. 425. (13) The court erred in refusing to give the peremptory instruction offered by appellant at the close of plaintiff's testimony. There was no evidence that this car had been iced prior to its arrival at Frankfort, Indiana. (14) *Res adjudicata*. Where there is no dispute that subject-matter was in suit before and where judgment and evidence shows cause must have been heard and determined upon merits, burden is upon party denyingestoppel to establish that cause was not heard upon merits. 24 Am. and Eng. Ency. Law (2 Ed.), pp. 833, 834; 2 Black on Judgments, sec. 724; Haseltine v. Thrasher, 65 Mo. App. 334; Best v. Hopper, 3 Colo. 137; Hubbell v. U. S., 171 U. S. 203; Armony v. Armony, 26 Wis. 152; Brothers v. Higgins, 5 J. J. Marsh (Ky.) 658. (15) Expert witness must be properly qualified before he can testify. Wigmore on Evidence, a555-561, and cases therein cited; Simmons v. Carrier, 68 Mo. 416. (16) This specification of error is based on the same grounds and is covered by the same rule and authorities as specification of error No. 15. (17) This specification of error is based on the same grounds and is covered by the same rule and authorities as specification of error No. 15. (18) The court erred in refusing to exclude the testimony of respondent's

witness, William Boyce. He absolutely failed to identify the car or the date. (19) The court erred in admitting the letter of Ed Keane, assistant general freight agent of the appellant railroad. This letter is inadmissible because it only amounts to an admission that Keane had heard this statement about icing, which he repeated, and not to an admission of the facts included in it. *Lord Trimlestown v. Kemmis*, 5 C. L. & F., 749, 780, 784; *Stephens v. Vroman*, 16 N. Y. 381; *Reed v. McCord*, 160 N. Y. 330, at p. 341. (20) The court erred in excluding from the evidence the check slip signed by George Meyers. Meyers had implied authority to sign said slip. *Benninghoff v. Ins. Co.*, 93 N. Y. 495; *Shackman v. Little*, 87 Ind. 187; *Star Line v. Van Vliet*, 43 Mich. 364. (21) The damages awarded under the so-called verdict are so excessive as to indicate that they were the result of bias and prejudice. *Unterberger v. Scharff*, 51 Mo. App. 102.

*Frank A. Thompson* for respondent.

(1) The law presumes that the preceding carriers do their duty and "act rightly;" and that the loss occurred on the delivering carrier's line, and this rule is founded not on the nature of the goods carried, but *ex necessitate* the burden is upon the delivering carrier to show positively that the goods came into its possession in a damaged condition. *Flynn v. Railroad*, 43 Mo. App. 424; *Hurst v. Railroad*, 117 Mo. App. 25; *Crouch v. Railroad*, 42 Mo. App. 248; *Lin v. Railroad*, 10 Mo. App. 125; *Beard v. Railroad*, 79 Ia. 527; *Beard v. Railroad*, 79 Ia. 518; *Railroad v. Cromwell*, 49 L. R. A. 462. (2) The court was clearly right in giving plaintiff's instruction No. 2. (3) The court was clearly right in giving respondent's instruction on the measure of damages, No. 3, in view of the clause pleaded in the bill of lading, basing damage on value of goods at point of shipment. *Ruppell v. Railroad*, 167 Pa. St. 166;



Davis v. Railroad, 70 Minn. 37; Shea v. Railroad, 63 Minn. 228; Caples v. Railroad, 17 Mo. App. 14; Rome v. Sloan, 39 Ga. 636; Finley v. Railroad, 9 Am. and Eng. R. R. Cases 31. (4) The court was right in giving instruction D-2, and not giving instruction 3. Beard v. Railroad, 79 Ia. 527; Beard v. Railroad, 79 Ia. 518; Holliday v. Railroad, 74 Mo. 159; Railroad v. Cromwell, 49 L. R. A. 462. (5) The court was right in giving instruction D-3, and in refusing to give appellant's instruction 3. Authorities supra. (6) The court was clearly right in refusing to give appellant's instruction D-3 A, because there was an abundance of evidence that the car contained no ice upon delivery at East St. Louis. (7) The court was right in refusing to give appellant's instruction D-4 A, because: 1. There was no contract to ice at Frankfort, Indiana, alone. 2. Even if there had been such a contract, it would have been void. 3. It was not pleaded by defendant. Phoenix Powder Co. v. Railroad, 101 Mo. App. 442; Beard v. Railroad, 79 Ia. 527; Beard v. Railroad, 79 Ia. 518; Holliday v. Railroad, 74 Mo. 159; Railroad v. Cromwell, 49 L. R. A. 462; Oxley v. Railroad, 65 Mo. 629; Clark v. Railroad, 64 Mo. 447. (8) The court properly refused to give instruction of appellant D-6, because there was evidence of the value of the peaches at Conklin, Michigan. (9) The court was right in refusing to give instruction 2 offered by appellant, and giving instruction D-2 in its place. (10) The court was right in refusing to give instruction 3 offered by appellant, and in giving instruction D-3 in its place. (11) The court was right in refusing to give instruction 4 offered by appellant and in giving instruction D-4 in its place. (12) The court was right in refusing to give appellant's instruction D-5, and in giving instructions 8 and D-4. (13) The court was right in refusing to give the peremptory instruction offered by appellant at the close of plaintiff's case.

Authorities cited under point 1. (14) The plea of *res adjudicata* must fail because it does not distinctly and clearly appear that the former dismissal was on the merits; neither was it, nor could it be, a final judgment upon the merits. *Murphy v. Creath*, 26 Mo. App. 581; *Mumma v. Staudte*, 36 Mo. App. 695; *Baldwin v. Davidson*, 139 Mo. 118; Sec. 724, art. 7, chap. 8, R. S. 1899; sec. 766, art. 9, chap. 8, R. S. 1899; sec. 768, art. 9, chap. 8, R. S. 1899. (15) Eugene G. Dean was properly qualified to give expert testimony on icing of cars, having used them for a great many years. (16) The court was right in allowing Mr. Dean to testify in regard to the value of the peaches at Conklin, because he was selling and handling peaches there all of the time. (17) The court was clearly right in allowing Mr. Dean to testify that if a car had once been under ice and the ice gave out the peaches would decay more rapidly than if they had never been iced at all. (18) The court was right in refusing to strike out the testimony of Will Boyce, because he was testifying about this particular car. (19) The court was clearly right in admitting a letter of Ed Keane, division freight agent of the defendant company. (20) The court was right in excluding the check slip signed by little Willie Myers for his father, George Myers. (21) By the undisputed testimony the damages are capable of exact computation, and the verdict does not indicate prejudice on the part of the jury. *Heil v. Railroad*, 16 Mo. App. 369; *Starr, Harknett & Edmiston Co. v. Railroad*, 122 Mo. App. 26.

STATEMENT.—Action for damages to a carload of peaches, 571 bushels, shipped from the town of Conklin, Michigan, via the Grand Rapids & Indiana Railway, the initial carrier, to Decatur, Indiana, where it was delivered to the defendant, the shipment made under contract with the initial carrier and the shipper to transport the peaches from Conklin to the city of East St. Louis, Illinois.

The petition avers the delivery of the peaches, all in good, sound, merchantable order and shipping condition, to the initial carrier, routed for transportation over the line of the initial carrier and that of the defendant, via Decatur, Indiana, to East St. Louis, Illinois, and there to be delivered to the plaintiff, named as consignee thereof. The petition further avers that the carload of peaches was thereafter, in the usual course of business between the connecting carriers, duly transported over the line of the initial carrier to Decatur, where upon their arrival they were delivered to the defendant as a common carrier in like good order and condition as when shipped; that the defendant received and accepted the carload of peaches so consigned and undertook to transport and deliver them at East St. Louis, with due care and within reasonable time, and it is alleged that the defendant carrier did not transport the peaches to their destination within a reasonable time and did not use reasonable and ordinary care for the protection and preservation thereof from injury or damage by heat or decay, in that it failed to properly re-ice said car while it was in its possession and under its control, but so negligently and carelessly conducted itself as a common carrier that the carload of peaches, while in its possession and under its control, became heated, speckled, decayed and damaged and thereby depreciated in market value, to the damage of plaintiff in the sum of \$1,072.71, for which amount and interest judgment is demanded.

The answer, after a general denial, avers, first, that whatever damage was sustained was caused by the negligence of plaintiff and his agents directly contributing thereto, in that the peaches had not been properly crated and protected or arranged for safe carriage. For another defense, it is set up that under the bill of lading, given under the laws of the state of Michigan, it is stipulated that no carrier is liable for loss or damage for causes beyond its control, nor for loss or

damage not occurring on its own road, and that whatever damage or loss occurred to plaintiff was occasioned by causes beyond the control of the defendant and not on the defendant's line. It is further averred that by the contract in the bill of lading above referred to, it is stipulated that no carrier should be liable in any event for more than the value of the goods at the time and place of shipment. It is set out that under the laws of Michigan, these were valid contracts. As another defense, it pleads that in an action between these same parties heretofore pending in the circuit court of the city of St. Louis, which action was commenced July 11, 1905, after issue had been joined and a jury had been sworn and the trial progressed, "that after a hearing upon the merits of said suit, and at the close of plaintiff's testimony, the court dismissed said cause owing to the admission of plaintiff as to the merits of said controversy, while said plaintiff was on the witness stand, said dismissal being made on motion of defendant, which said motion was sustained by the court, and the court entered an order of dismissal discharging the jury from the further consideration of said cause, and entered a judgment of dismissal at the costs of plaintiff, and further ordered that an execution should issue therefor." This on the thirty-first of May, 1906. Defendant pleads this in bar of the present action.

The reply was a general denial.

The statement of the case by counsel for appellant is so brief that we will give them the benefit of it by setting it out verbatim, and it is as follows:

"Eugene G. Dean, respondent, was in the fruit commission business in September, 1902, at St. Louis, Mo. Both prior and subsequent to September 24th of that year, the date of arrival at East St. Louis of C. R. L. No. 3047, the car in question in this case, he had received cars of peaches from Conklin, Michigan.

"Mr. Dean had purchased all of these peaches at Conklin while they were on the trees, and when ship-

ping time came around he was not there, but his agent at Conklin, Mr. Fowler, looked after the shipping and hired Mr. McWilliams to do the loading.

"This car, C. R. L. 3047, was loaded partly with crates and partly with baskets. The testimony is conflicting as to the method of loading, although it is undisputed that the baskets were not crated and Mr. McWilliams, Dean's agent for loading, testified:

"Q. Now would you say that your method of loading crates and baskets, which you have described, was a suitable method of loading a car that was to go from Conklin, Michigan, to East St. Louis, Ill.? A. I think it was, it was the best that we could do.

"Q. What do you mean by that answer? A. The baskets should be crated. They have crates to set the baskets into—then it would not be necessary to set baskets on the edges.'

"Furthermore, there is undisputed testimony that while McWilliams, assisted by Loren Nostrant, was loading C. R. L. 3047, on September 22nd, 1902, at Conklin, Michigan, this car was so severely struck by a freight train switching at said station as to knock Nostrant down and misplace all the baskets, some two hundred fifty, one and one-half feet. Said baskets were then set back, but the only examination made of the result of this collision on the peaches was by merely looking at the tops of the baskets.

"Both Mr. McWilliams and Mr. Fowler asked for a clear bill of lading from Mr. Quartermas, agent of the G. R. & I. Railroad at Conklin, and said if they did not get it they would put in a claim of damages, and thus, the trainmen would suffer; so in order to protect these trainmen, Mr. Quartermas issued a clear bill of lading.

"Mr. Quartermas further testified that the car was not iced at Conklin, Michigan. Shipping instructions were given by Dean's agent at Conklin under his direction to ice this particular car at Grand Rapids and

Frankfort and the bill of lading contains this direction. This car C. R. L. 3047 left Conklin September 22nd and arrived at East St. Louis at 12:30 p. m., September 24th, and it was agreed between counsel that there was no contention that it was not transported within reasonable time.

"John Isgrig, icing foreman at Frankfort, Indiana, testified that at 9:15 p. m., September 23d, he opened the bunkers of this car and filled them with 2500 pounds of ice at the ice house there.

"This car arrived at East St. Louis at 12:30 p. m., on the 24th. There is some conflict of testimony as to when it was first opened.

"Mr. Dean testifies that it was opened at 7:00 a. m., September 25th, when he himself examined the car, finding the peaches heated and worthless, the temperature of the car warm and not a particle of ice in the ice boxes.

"Robert Stuermer testified that at 12:30 p. m., on September 24th he examined the ice boxes and found them one-third full and that the car was not opened until 5:00 p. m., September 26th.

"There was testimony that there was 571 bushels of Alberta peaches in this car; that the market value at East St. Louis was \$2 a bushel, and that these peaches were sold for \$193.65.

"There was expert testimony that if peaches have once been under ice and then the ice gives out, peaches under this condition, will spoil quicker than peaches that have never been iced before; that where the car is heated and hot it is very hard to get it cooled off again, and if the car is iced and the ice is allowed to run down in the car and the car gets heated and hot, it takes but a short time to rot the goods enough to make them worthless. As the ice melts, it becomes more compact, and the ice will not melt as fast when a car is standing on the siding, as it will when it is moving."

In addition to this statement, we find that an examination of the several abstracts which have been filed in the case discloses the following facts:

It appeared by the evidence in this case that this carload of peaches was to be carried in a refrigerator car and was loaded in one. The only evidence to show that, at the time the peaches were loaded in the car, the car had been iced, is contained in a letter of date January 7, 1903, from the division freight and passenger agent of the defendant, written to the plaintiff on the letter head of the defendant, returning to plaintiff the papers that he had presented to the railroad company (defendant) in support of his claim for damages, amounting to \$1072.71. In this letter the division freight and passenger agent writes: "The movement of this shipment has been investigated and it is shown car 3747 C. R. L. was iced empty at Grand Rapids, Michigan, and forwarded to Conklin, Michigan, for loading September 19th. The shipper began loading car September 20th, and loading was finished Monday, September 22nd, and car forwarded same day. The loaded car was re-iced at Grand Rapids and again at Frankfort, Indiana, and arriving at East St. Louis 12:30 p. m., September 24th, being but forty-eight hours in transit, Conklin to East St. Louis. Our agent East St. Louis reports that the ice boxes were about one-third full and the temperature of the car when opened was all that could be expected." The claim was consequently returned by the agent to plaintiff rejected. When this letter was offered in evidence, it was objected to by defendant as incompetent, immaterial and irrelevant under any issue in this case and because it appears that it refers to a different car from the one involved in this suit, that being No. 3047, C. R. L. The objection was overruled and plaintiff, testifying as a witness, said that the writer of it was the division freight and passenger agent of the defendant and that he (plaintiff)

had received this letter from him in regard to this claim.

It also appears in evidence that the peaches were packed in baskets and the baskets set in tiers and the tiers fastened together by slats or ropes, and there was evidence tending to show that that was the customary, although not the only, way of loading and shipping peaches. There was testimony on the part of plaintiff tending to show that when the car was opened at East St. Louis by plaintiff's employees, it was found to be hot,—as one witness said, when they opened the door, "a blast of heat" struck them in the face. On the part of the defendant there was evidence tending to show that the car was the proper temperature when it was opened at East St. Louis, and that the ice boxes in the car were from one-fourth to one-third full, and that this was to be expected and was the usual result of carriage for the time this freight was on its way. The waybill introduced in evidence calling for re-icing of the car at Grand Rapids and Frankfort, Indiana, and it was testified to by witness and also noted on the waybill that the car had passed Decatur, Indiana, the 22nd of September and had been iced at Frankfort, Indiana, September 23rd, twenty-five hundred pounds of ice being put in it at that time. There was testimony on the part of plaintiff that the value of the peaches in the car at the time he examined them in St. Louis was \$193.65; that was what they had been sold for and that, witness testified, was their value in East St. Louis, in the condition in which they had arrived at East St. Louis and had been delivered to him. There was testimony to the effect that these were what are called Alberta peaches and that in good, sound condition at that time at East St. Louis, they were worth two dollars a bushel, which for the 571 bushels, would be \$1142. There was testimony to the effect that their value at the time of shipment at Conklin, Michigan, was \$1.50, which for the 571 bushels would be \$856.50. There was no testi-



mony as to their value at Conklin in their damaged condition. The waybill before referred to shows that the charges for icing were two dollars and for freight, ninety dollars, a total charge of ninety-two dollars. While there is no positive evidence that this was the amount of freight charges paid by the plaintiff, there is testimony given by defendant's witnesses to the effect that plaintiff was not allowed to have access to the car nor was delivery made to him of the consignment until he had paid the charges, as, according to these witnesses, the plaintiff "was not on the credit list" of the defendant. It was agreed by counsel on each side "that the only allegation of negligence on which the issues were to be drawn was with reference to the re-icing of the car, and there was no contention that it was not transported within a reasonable time."

At the close of the case the court gave a number of instructions for each side and several of its own motion. We will only notice such instructions or parts thereof that are either specifically objected to or the refusal of which is assigned as error. In the first instruction, given at the instance of the plaintiff, the court told the jury that if they found from the evidence that the plaintiff delivered to the Grand Rapids & Indiana Railway Company, the certain carload of peaches, "all in good, sound, merchantable order and shipping condition and properly loaded into C. R. L. car 3047, billed, marked and consigned for transportation over the line of said Grand Rapids & Indiana Railway Company, and that of the defendant company, the court instructs you that you may presume in the absence of evidence to the contrary that the said Grand Rapids & Indiana Railway Company did its full duty, and thereafter, in the usual course of business, duly transported said car over its line and duly delivered it to the defendant at Decatur, Indiana, in like good order as when shipped, and if you believe and find from the evidence that said defendant received and accepted said car of peaches at

Decatur, Indiana, so billed, marked and consigned, and if you further find that the said carload of peaches, by reason of its perishable nature, required for its protection and safe carriage a refrigerator car provided with iceboxes or bunkers for holding ice to keep the contents of the car cool in warm or hot weather, and that said cars were in common and general use by the railways of the country known to and used by the defendant as a common carrier at the time of this shipment, which cars required the use of ice to render them effective when so employed, then the court instructs you that it was the duty of the defendant company, as a common carrier, to keep the ice boxes or bunkers of the car in suit, at all times during transportation over its line, and until delivery at East St. Louis, Ill., reasonably filled with ice in the usual and customary manner and to the extent which you shall find from all the evidence in the case was reasonably required and customarily used for the care and protection of such fruit under all the facts and circumstances of this case. And the court instructs you that if you find from all the evidence in this case that the defendant company, while the said car of peaches was in its possession during transportation and until delivery at East St. Louis, Ill., failed to keep the ice boxes or bunkers of the car in suit filled with ice in the usual and customary manner and to the extent which you shall find from all the evidence in the case was reasonably required and customarily used for the care and protection to such fruit, under all the facts and circumstances in this case, and you further find that, as a direct and proximate result of said failure to ice said car as aforesaid, the said peaches became damaged and declined in value, then you will find in favor of the plaintiff and against the defendant."

The second instruction given at the instance of plaintiff told the jury that if they found that the peaches were not properly loaded into the car, yet if they found that the failure of the defendant to prop-

erly re-ice and keep the car re-iced as outlined in the previous instruction was the cause of the damage to the peaches, they should find for plaintiff.

The third instruction told the jury that if they found in favor of plaintiff, "the measure of his damages shall be determined by you by the market value, as shown by the evidence, of the car of peaches in suit at Conklin, Mich., in the condition in which it was shipped at such time as you find from the evidence it was shipped, less the market value of the car of peaches in suit at the time it was delivered in East St. Louis in its condition as delivered there, and such further amount as you may find plaintiff for freight charges on said car."

Of its own motion the court gave three instructions. The first one, marked "D 2," was to the effect that the burthen of proof rested on plaintiff to prove by a preponderance or greater weight of evidence that defendant "failed to properly re-ice the car mentioned in the evidence while in its charge and before delivering it to the plaintiff, and that damage resulted to said shipment by reason of the failure to properly re-ice said car. And if you believe the plaintiff has failed to prove these matters by a preponderance or greater weight of evidence, then you are instructed to find your verdict for the defendant."

The second instruction, marked "D 3," given by the court of its own motion, was to the effect that if the jury found from the evidence that the peaches were negligently packed in the car by plaintiff or his agents or shippers, and that the damage to said peaches was caused or contributed to by the careless and negligent manner in which the peaches were packed and arranged, "then, even though you may find the defendant guilty of negligence, plaintiff cannot recover for such damage unless you are able, from all the evidence, to determine the amount of the damage that resulted to said peaches by reason of the careless and negligent manner in which

they were packed and arranged in said car, and also the amount of damage, if any, occasioned by the negligence of the defendant in failing to properly re-ice said car, if you find from the evidence it did so fail."

The third instruction given by the court of its own motion, marked "D 4," told the jury that if they found that while the car was being loaded at Conklin, it was struck by another train of cars of the Grand Rapids & Indiana Railway Company, and by reason of this collision the peaches in the car or any part thereof were displaced or tumbled over and damaged, then the jury were instructed that plaintiff could not recover for any such damage, even if the jury found from the evidence that the defendant was guilty of negligence in failing to re-ice the car, and that damage resulted from that negligence, "yet if you are unable to separate the damage, if any, to said peaches resulting from said collision and the damaged condition, if any, resulting from said negligence on the part of the defendant, you are instructed that plaintiff is not entitled to recover and you will find your verdict for the defendant."

Defendant duly excepted to the giving of these instructions.

At the request of the defendant the court gave two instructions. The first was that there is no evidence in the case of any negligence in failing to transport the carload of peaches within a reasonable time. The second was that the bill of lading provides that the property should be removed by the consignee within twenty-four hours after its arrival at destination and that if the property was not removed within that time, it thereafter remained in the car at the sole risk of the owner, and if the jury found that the peaches were not removed by the plaintiff within twenty-four hours after he was notified of their arrival at East St. Louis, and that damage resulted after the lapse of the twenty-four hours, plaintiff could not recover for any such damage, and the verdict should be for the defendant.

These were all the instructions given.

The defendant asked eight instructions, all of which were refused. One was to the effect that there is no evidence in the case that the defendant failed to properly re-ice the car and that the jury would disregard this allegation of negligence in arriving at a verdict. Another was as to the veracity and credibility of the witnesses, and told the jury that in considering the testimony of any witness, "they can take into consideration the interest of said witness in the results of this litigation." The third request was for an instruction to the jury that by the terms of the contract under which the peaches were shipped, defendant was only required to re-ice the car at Frankfort, Indiana, and if they found from the evidence that the defendant complied with this contract "and filled the ice boxes of the car at Frankfort, Indiana," they should find for defendant. Another instruction asked was that if the jury found a verdict for plaintiff they could only return a verdict for nominal damages. By another one the court was requested to instruct the jury that plaintiff must prove by a preponderance or greater weight of evidence that defendant failed to re-ice the car "at Frankfort, Indiana, and damage resulted to said shipment by reason of the failure to re-ice said car at Frankfort, Indiana," and if plaintiff failed to prove this by the preponderance or greater weight of evidence, they must find for defendant. Another instruction asked was to the effect that if the peaches were negligently packed and arranged in the car by plaintiff or his agents and that the damage was caused or contributed to by the careless and negligent manner in which they were packed and arranged, plaintiff could not recover. Another one asked the court to instruct the jury that if they found that while the car was being loaded at Conklin, Mich., it was struck by another car of the Grand Rapids & Indiana Ry. Co., and that in consequence of that the peaches or a part of them were displaced or tumbled over and damaged, then

the plaintiff could not recover for any such damage, although they might find that defendant was guilty of negligence, "in failing to re-ice this car at Frankfort, Indiana, and that damages resulted from said negligence," yet if they were unable to separate the damage to the peaches resulting from the collision and the damaged condition resulting from failure to re-ice the car, plaintiff could not recover. The final instruction asked was to the effect that the defendant is not liable for any damage caused or occurring while plaintiff's shipment was not on the line of defendant's railroad, and if they found that the alleged damaged condition of the peaches was caused by the collision while the car was at Conklin or was caused or contributed to by plaintiff or his agent by reason of the negligent manner in which they were packed and arranged in the car, they should find for defendant.

In addition to these instructions, at the close of the evidence, the defendant asked a direction for a verdict on all the evidence in the case. This was refused, defendant duly saving exceptions to the refusal of this as well as to the refusal to give the other instructions above referred to. The jury returned a verdict in favor of plaintiff and assessed his damages at \$936.89. Motion for new trial was filed and pending its determination plaintiff remitted \$182.04. The motion for new trial was accordingly overruled and judgment entered in favor of plaintiff for \$754.85. In due time defendant prayed for and perfected an appeal to this court, saving exceptions to the adverse rulings of the court.

REYNOLDS, P. J. (after stating the facts).—The first proposition made, among the twenty-one points in the very elaborate brief of the learned counsel for appellant, is that the rule that goods delivered in good order to an initial carrier are presumed to continue so until they get into the possession of the carrier which delivers them at the place of destination in a damaged

condition, cannot apply to highly perishable property. Counsel cite in support of this position, *Lin v. Terre Haute & Ind. R. Co.*, 10 Mo. App. 125; *Crouch v. Louisville & Nashville Ry. Co.*, 42 Mo. App. 248; *Flynn v. St. Louis & S. F. Ry. Co.*, 43 Mo. App. 424; *Hull v. St. Louis, Trustee*, 138 Mo. 618. None of these cases support this contention of an exception to the general rule. Referring to the last one, *Hull v. St. Louis*, it appears that it was an action for compensation for personal services rendered by plaintiff for defendant in and about the appraisement of certain property, which it holds in trust as a charitable fund to furnish relief to all poor emigrants and travelers coming to St. Louis bona fide to settle in the West. We are unable to conjecture any reason for its citation in this case. *Lin v. Railroad*, was a suit for damages to a trunk in transit. *Crouch v. Railroad*, was for damages for injury to horses. *Flynn v. Railroad*, is for injury to household goods. We are at a loss to understand how any of these Missouri cases can be said to have injected an exception in favor of highly perishable property to the rule which they all announce as the one governing in this State, namely, that goods delivered in good order to an initial carrier are presumed to continue so until they get into the possession of the final carrier. This court distinctly held, in *Hurst v. Railroad*, 117 Mo. App. 25, the opinion in the case written by Judge GOODE, that "as there was no proof that the fruit was already damaged, the presumption, in the absence of evidence on the issue, would be that defendant delivered it in good condition to the last carrier and the damage occurred on its line." Judge GOODE cites in support of this, *Crouch v. Railroad* and *Flynn v. Railroad*, *supra*. So that this case in effect holds that the same rule of presumption applied, whether the freight carried was perishable, as peaches or apples, or non-perishable, as in the case of household goods or the like. In support of their proposition, counsel have referred us to the case

of *Swetland v. Boston & Albany R. Co.*, 102 Mass. 276. It is true that that case was one involving a right to recover damages alleged to have been sustained by the freezing of a carload of apples carried over two roads, and it is true that the court held in that case that there was no evidence in it authorizing a jury to find that the apples were delivered to the final carrier before they were frozen. But this is not stated in the Massachusetts case as an exception to the rule which the court seems to recognize as pertaining to all shipments, and all that can be said of it is that if it applies to shipments generally or to perishable freight in particular, it is not in line with our Missouri decisions.

The proposition is also made by counsel for appellant, that in case of loss of goods, the market value must be determined in one market to apply to goods in good condition at that one market. Counsel cite in support of this *Heil v. St. L., I. M. & S. Ry. Co.*, 16 Mo. App. 363. In that case it is distinctly held that a stipulation in the bill of lading, that the cost of the property at the point of shipment shall govern in case of loss, does not refer to damage or deterioration while in transit, and that the measure of damages for the injury of goods while in transit is the difference between the reasonable market value of the goods at the point of destination when they should have arrived and their real value there in their damaged condition. In *Caples v. Louisville, etc., R. R. Co.*, 17 Mo. App. 14, under a like stipulation in the bill of lading as in this case, it was held that the measure of damage is the difference in value at the place of shipment. But by this instruction the court set two markets, that at the point of shipment and that at the point of destination. This instruction is erroneous. Complaint is also made to that part of this instruction which allows the jury to include in the damage, "such further amount as you may find plaintiff for freight charges on said car."



This should not have been given. Plaintiff was liable for at least the freight charges on so much of the carload as he received, if freight charges are to be considered. He was not liable, however, for freight charges on the damaged part of the goods. If the measure of damage was the value of the peaches in the East St. Louis market, that value in the East St. Louis market would generally be the cost at point of shipment, plus the freight and charges of carriage, plus any increase in value, so that in no case should the freight be added to the East St. Louis value.

Another proposition strenuously argued and elaborately briefed by the learned counsel for appellant is on the plea of *res adjudicata*. It is sufficient to say of this that in the first place, it is not properly pleaded, as no final judgment is pleaded, the judgment as pleaded being merely a judgment of dismissal and for costs, and in the next place the record introduced in evidence shows in itself that it was a judgment of dismissal, by direction of the court, it is true, but not on a verdict or finding as on a trial before the court or the jury. That is to say, there is no final judgment finding for the defendant on the issue joined. Practically, the judgment of record and as pleaded, is of the same effect as if plaintiff had been forced by the ruling of the court to take a nonsuit, and whether he takes that voluntarily or is forced to take it by the action of the court in either case, it is a mere dismissal of the cause and not a judgment that can be pleaded in bar of any subsequent action between the same parties on the same subject-matter.

Much stress is laid upon the alleged error of the court in admitting in evidence the letter from the freight agent of the defendant to the plaintiff, which we have set out practically in full in the statement of the case. The objection made to this is that it is hearsay and as it is the only evidence in the case of the fact that the car was iced when loaded, that, if it had been excluded,

it left the plaintiff without any testimony whatever on this very vital proposition. That would be true, but we do not think that this letter and the statements in it come within the class of hearsay testimony; on the contrary, it is a distinct admission of a constitutive fact by a recognized agent of the defendant, made in the line of his duty and in the performance of his official work.

Serious complaint is made of the instructions as given and the refusal of those asked by the defendant. We have given the substance of them and see nothing either in those given or in those refused to the prejudice of the defendant, except the one as to the measure of damages. Those given are substantially correct and properly cover the issues and those refused either had been covered by those already given by the court, either at the instance of the plaintiff or of its own motion, were framed in such language as prevented the court from giving them, or were outside the issues joined in the pleadings.

One of the propositions most insisted on is that the court below erred in refusing the third instruction requested by defendant, that the contract under which the peaches were shipped only required the defendant to ice the car at Frankfort, Indiana, and if the jury found that had been done, defendant had complied with its contract and was entitled to a verdict. The answer contained these defenses: First, a general denial, second, a plea of contributory negligence on the part of plaintiff, his agents and servants in the loading of the peaches; third, that the bill of lading provided every service performed in hauling the peaches should be subject to the conditions of the bill of lading and one condition was no carrier should be liable for losses beyond its control or occurring beyond its own line; that the loss in question occurred from causes beyond defendant's control and not on its line; fourth, that the contract of shipment provided no person should be liable in any event for more than the value of the goods at the time

of shipment and that claims for loss or damage should be promptly made in writing to the agent at point of delivery or no carrier should be liable in any event; that no such claim was served on defendant at point of delivery; fifth, the plea of former adjudication. It will be seen that the answer did not plead any defense based on a condition of the contract by which plaintiff himself directed defendant to re-ice the car only at Frankfort, Indiana, or reserved the right to control the icing. This defense not being pleaded and no issue being raised to which the third requested instruction would be relevant, it was rightly refused for that reason. If defendant wished to avail himself of such a defense, it should by its answer have invoked the provision of the contract by which plaintiff is said to have directed the icing of the car and have alleged obedience to his direction. [Halliday v. Railroad, 74 Mo. 159.]

On the argument, counsel for defendant in open court waived the point made in the brief as to the instruction on the measure of damages so that that is no longer in the case. We do not think the judgment should be reversed as excessive, after the remittitur entered by plaintiff. Wherefore, as all the points raised on the appeal, except the one on the measure of damages, and that one waived by the defendant, have been resolved against defendant, the judgment will be affirmed. All concur.

**S. SIGALOFF, Respondent, v. INDEPENDENT  
BREWERIES COMPANIES et al., Appellants.**

**St. Louis Court of Appeals, May 17, 1910.**

1. **JUSTICES' COURTS: Appeal to Circuit Court: Failure of Appellant to Appear for Trial: Summary Affirmance of Judgment.** Under section 1557, Revised Statutes 1899, authorizing the court on appeal from a justice to affirm the judgment on the failure of appellant to prosecute the appeal, a defendant, who perfected his appeal and served on plaintiff a proper notice ten days before the first day of the next term of the circuit court, but who failed to appear on the day the case was properly set for trial, failed to prosecute the appeal, and the court could affirm the judgment, though plaintiff did not comply with section 4075, which applies only where appellant omits to give notice of his appeal.
2. **APPELLATE PRACTICE: Discretion of Trial Court: Refusal to Set Aside Default: Counsel Engaged in Attending to Other Cases.** An application to set aside a default judgment, on the ground that counsel for defendant was engaged in other cases and was misled by the state of the docket and thus permitted a judgment by default, is addressed to the sound discretion of the trial court, and its refusal to grant relief does not indicate an abuse of discretion, for which alone its action may be reversed on appeal.
3. **———: ———: ———: ———: Sufficiency of Application to Set Aside Default.** An appellate court will not interfere with the refusal of the trial court to set aside a default judgment unless defendant discloses to the trial court a meritorious defense, that his failure to appear was induced for some good reason, and that notwithstanding the exercise of due diligence to be present in court he was precluded from so doing; and a statement in general terms that defendant has a meritorious defense is not sufficient, it being necessary to set out the facts relied upon as a defense.

**Appeal from St. Louis City Circuit Court.—Hon. J.  
Hugo Grimm, Judge.**

**AFFIRMED.**

*Cloud D. Hall* for appellants.

(1) An order affirming a judgment of a lower court without a trial *de novo*, for mere failure of the appellant to appear can only be based on a statute. *State v. McCarthy*, 4 R. I. 867; 3 Cyc. 412. 1. There is no statute authorizing such affirmance. Section 4075 of the Revised Statutes 1899, does not apply, because, (a) The defendant gave notice of the appeal. *Holloman v. Railroad*, 92 Mo. 286. (b) Plaintiff did not enter his appearance in said cause on or before the 2d day of the term. *Mumma v. Staudte*, 24 Mo. App. 473; *Smith v. Railroad*, 20 Mo. App. 689; *Fisher v. Anderson*, 101 Mo. 469. (c) Plaintiff (appellee) did not demand a trial as provided by section 4075. There is nothing in the order affirming the judgment of the justice, or elsewhere in the record, showing that the plaintiff demanded a trial. 2. Section 1557, R. S. 1899, is no authority for the affirmance of a judgment without a trial. This provision means that to prosecute an appeal according to law, the appeal should be filed, the filing fee paid and notice of appeal given. In other words, it only refers to the necessary steps to place the case in the circuit court for trial *de novo*. *Meitz v. Koetter*, 51 Mo. App. 370. 3. Section 4071, R. S. 1899, requires a trial *de novo*. 3 Cyc. 260; *State v. McCarthy*, 4 R. I. 86. 4. Section 4073, R. S. 1899, provides that all appeals shall be tried and determined at certain times, etc. 5. The appeal being properly filed, docketed, and the notices of same having been given, the judgment of the justice was vacated and there was no judgment to affirm. *Sublette v. Railroad*, 96 Mo. App. 122; *Carrollton v. Rhomberg*, 78 Mo. 547; *Turner v. Northcut*, 9 Mo. 249; *State v. McCarthy*, 4 R. I. 86. (2) The refusal of the court to set aside the order affirming the judgment, in view of the circumstances as set forth in the defendant's application and motion to set aside the order affirming the judgment, was an abuse of discretion and judgment,

and for that reason this court should reverse the judgment of the lower court. *Stout v. Lewis*, 11 Mo. 438.

*Jno. B. Dempsey* and *R. G. Meigs* for respondent.

(1) An appellee, in a cause appealed to the circuit court from a justice of the peace, is entitled, where the cause is for trial, and the appellant fails to prosecute his appeal, to a judgment of affirmance, and he is entitled to such affirmance whether the cause is for trial at the demand of either party or at the option of the appellee only. *Holloman v. Railroad*, 92 Mo. 284; *Chadbourn v. Hageman*, 7 Mo. App. 561; *Kain v. Touhey*, 80 Mo. App. 350. (2) Defendant gave due notice of its appeal and therefore it was not incumbent on plaintiff to enter his appearance on or before the second day of the (April) term. Secs. 4074, 4075, R. S. 1899. (3) Where the record of the trial court is silent, uncertain or indefinite, all presumptions are in favor of the judgment of a court of record. *Bearden v. Miller*, 54 Mo. App. 201; *In re Tucker*, 74 Mo. App. 334; *Murphy v. De France*, 105 Mo. 62; *State ex rel. v. Bank*, 120 Mo. 168. (4) The prosecution of an appeal from a justice court "according to law" means that the appeal shall be filed, the notice given, the filing fee paid, all of which are preliminary matters, but the word appeal refers not merely to preliminary steps, but to the action on appeal, which the appellant is bound to appear to and prosecute. *Chadbourn v. Hageman*, 7 Mo. App. 561; cited in *Kain v. Touhey*, 80 Mo. App. 353; *Holloman v. Railroad*, 92 Mo. 284. (5) The motion to set aside the affirmance does not state facts showing diligence. *Gullett v. Swinney*, 61 Mo. App. 226; *Pry v. Railroad*, 73 Mo. 123; *Wilson v. Scott*, 50 Mo. App. 329. The motion must both show diligence and meritorious defense. *Hoffman v. Lauden*, 96 Mo. App. 184; *Robyn v. Chronicle Pub. Co.*, 127 Mo. 385; *Hulbert v. Tredway*, 159 Mo. 665. The meritorious defense means a statement of facts relied

upon from which the court may itself judge the question of merit. *Lamb v. Nelson*, 34 Mo. 503; *Carr v. Dawes*, 46 Mo. App. 358. It is an abuse of discretion for the court to set aside a judgment without a showing of diligence and meritorious defense. The right to set aside judgment is not an absolute one. *Carr v. Davis*, 46 Mo. App. 358; *Arnold v. Palmer*, 23 Mo. 411.

NORTONI, J.—The principal question in this case relates to the action of the circuit court in affirming a judgment of a justice of the peace for the failure of appellant to prosecute his appeal theretofore perfected to the circuit court. It appears plaintiff instituted the suit before a justice of the peace and upon the trial recovered judgment against the defendant on March 16, 1909. From this judgment, the defendant perfected an appeal to the circuit court on March 24, 1909, which was more than ten days before the first day of the next, or April term. In due time, the transcript of the justice of the peace, together with the original papers in the case, was filed in the office of the circuit clerk and defendant paid the filing fee as required by statute. On March 25, and more than ten days before the first day of the April term of the circuit court, defendant served a proper notice of appeal on the plaintiff which was subsequently duly returned and filed among the papers of the case. The case was properly set on the docket of the April term of the circuit court for trial on the 24th day of May. During the term and on the 24th day of May, when it was reached, plaintiff appeared and answered ready for trial, but defendant, although three times duly called, did not respond to prosecute the appeal. Thereupon plaintiff moved the court to affirm the judgment of the justice, which motion the court sustained and in all things affirmed the judgment of the justice of the peace. On the following day defendant's counsel appeared and moved the court to set aside its judgment theretofore given, affirming the judg-

ment of the justice, and to reset the case for trial. This motion was overruled and the present appeal is prosecuted by defendant on the theory that the judgment of the circuit court affirming that of the justice of the peace was given without authority of law. It is argued that as no authority resides in the circuit court for summarily affirming a judgment of a justice of the peace on motion without hearing the proof, except in those instances specifically authorized by the statute, the court erred, for the reason no such statutory power is conferred over the particular facts of this case. We are not so persuaded. Our statute, section 4073, Revised Statutes 1899, section 4073, An. St. 1906, touching appeals in civil cases from justices of the peace provides that "All appeals allowed ten days before the first day of the term of the appellate court next after appeal allowed, shall be determined at such term unless continued for cause." The appeal in this case was granted by the justice more than ten days before the next succeeding or April term of the circuit court and was therefore returnable to that term. The statute quoted conferred complete power on the circuit court to determine the appeal at the term mentioned. There can be no controversy over this matter. Indeed, so much is conceded; but defendant argues that although the appeal was granted more than ten days before the term and that he paid the filing fee, caused the transcript of the justice to be filed in the circuit court and the case was properly placed upon the docket of that term for hearing May 24th, the court was not possessed of authority to summarily affirm the judgment of the justice without a trial *de novo*. Section 4074, Revised Statutes 1899, section 4074, An. St. 1906, provides that if the appeal is not allowed on the same day on which the judgment of the justice of the peace is rendered, the appellant shall serve the appellee at least ten days before the first day of the term of court at which the cause is to be determined with a notice of appeal, etc. Acting under this section, defend-



ant properly served plaintiff with a notice of appeal on March 24th, which was more than ten days before the first day of the April term. Section 4075, Revised Statutes 1899, section 4075, An. St. 1906, provides substantially that if the appellant fails to give notice of his appeal as required, the cause shall at the option of the appellee be tried at the first term if he shall enter his appearance on or before the second day thereof or shall be continued at his instance as a matter of course until the succeeding term. And after so providing, that section concludes as follows: "When, however, the appellee enters his appearance and demands a trial as provided for by this section and the appellant fails to appear, the judgment on motion of appellee shall be affirmed." In this case, it appears plaintiff, who was appellee in the sense of the statute, omitted to enter his appearance in the circuit court on or before the second day of the term. In view of this fact, the argument proceeds on the statutes mentioned to the effect that the circuit court was without power to summarily affirm the judgment of the justice. It is said that if plaintiff had entered his appearance on or before the second day of the term under the statute last referred to, the judgment of the circuit court affirming that of the justice of the peace would have been competent and proper; but it appearing he omitted to do so, no authority in support of the judgment is conferred by that statute. If this statute were the source of the authority for the action of the court in affirming the judgment of the justice, the argument would inhere with much force. But another statute, section 1557, as will be presently pointed out, seems to confer complete authority in support of the judgment. The statute, section 4075, *supra*, on which defendant bases its argument, seems to contemplate that the appellee shall have an option with respect to the matter of trial or no trial at the term to which the appeal is returnable. In those instances where appellant omits to give notice of his appeal and the ap-

pellee desires an early determination of the case, he may enter his appearance on or before the second day of the return term and demand either that the case be tried or that it be continued until the succeeding term at the cost of the appellant. This option is given to the appellee in lieu of his right which might otherwise prevail to have the appeal dismissed for the failure of appellant to give the required notice, as the section pointedly provides after conferring such option that no appeal shall be dismissed at that term for want of notice of appeal. It then proceeds on the theory that the appellant is in default for having failed to give notice of the appeal and says that when the appellee has entered his appearance and demanded a trial, he may have an affirmance of the judgment on motion if the appellant fails to appear.

This statute does not contemplate the identical situation presented by this record, for here it appears the appellant had properly given plaintiff notice of appeal in due time as though he intended to prosecute the same at the return term. It is certain plaintiff had the right to assume defendant intended to prosecute the appeal in accordance with the terms of the notice given and to prepare himself accordingly. After having thus prepared himself and appeared in court in response to the defendant's notice, he was entitled to a default or judgment of affirmance against defendant if he failed to appear. But defendant argues that although the court was possessed of the cause at that term to try the same *de novo* it could not declare defendant in default and summarily affirm the judgment of the justice without hearing the proof, for the reason it had prosecuted its appeal according to law although it did not answer at the time the case was called in court. This argument goes to the effect that by appealing from the justice of the peace, giving the notice of appeal, as required by statute, causing the transcript of the justice to be filed in the circuit court and paying the filing fee

therefor, defendant had performed all acts incumbent upon it to the end of perfecting its appeal and its rights should not be thus summarily adjudicated in its absence for no other reason than the mere fact it defaulted in appearance when the case was set for trial. The statute before referred to, but not quoted, is a general provision, evidently intended by the lawmakers to include such instances as were not otherwise specifically provided for. It is in the following language: "In all cases where an appeal from a judgment of the county court, probate court or a justice of the peace shall not be prosecuted by the appellant according to law, the judgment shall be affirmed, and the costs adjudged accordingly." Under this identical section it has been decided by both the Supreme Court and this court that besides performing the antecedent acts essential to perfecting an appeal from the justice and rendering the cause triable at the term of court during which it is disposed of, it devolves upon the appellant to appear in the court, answer to the call of the case and prosecute the appeal therein. In other words, the authorities rule that unless the appellant actually appears in court, answers to the call of the case and proceeds to prosecute his appeal when called, he is in default. Nothing less than this will satisfy the terms of the statute requiring the appellant to prosecute his appeal. [Holloman v. St. Louis, I. M. & S. Ry. Co., 92 Mo. 284, 5 S. W. 1; Kain v. Tuohy, 80 Mo. App. 350.] The result of the authorities is said by our Supreme Court to be that when the case stands for trial at the demand of either party or at the option of the appellee only under section 4074, above quoted, the court may summarily affirm the judgment for the default of the appellant in failing to appear and prosecute the same when it is called. [Holloman v. St. Louis, I. M. & S. Ry. Co., 92 Mo. 284, 5 S. W. 1.] It appears that though plaintiff had failed to enter his appearance on or before the second day of the term which was not essential in view of the notice of appeal

theretofore given to him by appellant, the cause stood for trial at the April term on demand of either party, unless continued for sufficient cause shown. The fact that defendant had given notice of appeal certainly placed it in a position to avail itself of a default on the part of plaintiff if he had omitted to appear and defendant had done so. In such circumstances no doubt defendant would have moved a dismissal of the cause for the reason plaintiff failed to appear and prosecute the same although duly notified in accordance with the statute. In sound reason, it must follow that if plaintiff could thus be mulcted by his failure to appear, defendant, having given the notice and required him to be present in order to protect his rights should suffer the consequences for his default in omitting to prosecute the appeal when called.

The motion of defendant by which it sought to set aside the judgment of affirmance is accompanied by an affidavit of counsel to the effect that he was present in the courthouse attending to other cases and in the clerk's office looking after the interests of other clients at the time the judgment of affirmance was given in this case. It is furthermore stated therein that he expected and intended to prosecute the appeal in this case if plaintiff was ready for trial but was misled by the state of the docket which indicated the case might not be reached until later in the day. The court denied the motion and it is argued here that in so doing it arbitrarily exercised its discretion to the great detriment of defendant. For this reason, it is said the judgment should be reversed with directions to the trial court to set its judgment aside and reinstate the cause on its docket for trial. It has been several times pointedly decided by our Supreme Court that the mere fact counsel is engaged in the courthouse in the disposition of other cases and, being misled by the state of the docket, permitted a judgment by default to be given against his client is insufficient to authorize the appellate court to interfere

and grant the relief which the trial court refused. The doctrine is that such facts address themselves to the sound discretion of the trial court and that its refusal to grant the relief sought in no manner indicates an abuse of such discretion, for which alone judgments may be reversed on such discretionary matters. [Jacob v. McLean, 24 Mo. 40; Griffin v. Veil, 56 Mo. 310; see also Wilson v. Scott et al., 50 Mo. App. 329.] Indeed, the rule which obtains with respect to the disposition of such matters in the appellate court is that such courts will not interfere with the action of the trial court in refusing to set aside a judgment by default unless it appear the defendant disclosed to the trial court, first that he had a meritorious defense to the action, and, second, that his absence or failure to appear was induced for some good reason, and, third, notwithstanding the exercise of due diligence on his part to be present and present the same, he was precluded from so doing. And then, too, the facts constituting the alleged meritorious defense must be set forth to the end that the court may adjudge of their sufficiency if established by proof. Upon these matters appearing, appellate courts may reverse the judgment only in cases where the record discloses the trial court arbitrarily exercised or abused its discretion. [Pry v. H. & St. J. R. R., 73 Mo. 123; Robyn v. Chronicle Pub. Co., 127 Mo. 365, 30 S. W. 130; Hulbert v. Tredway, 159 Mo. 665, 60 S. W. 1035; Hoffman v. London, 96 Mo. App. 184, 70 S. W. 162; Wilson v. Scott, 50 Mo. App. 329.] In this case, although plaintiff showed very good reasons for his failure to be present at the time the case was called, nothing appears to the effect that he had exercised any diligence whatever towards preparing for the trial. Indeed, the affidavits disclose only that he intended to prosecute the appeal provided plaintiff answered ready for trial, whereas it was his duty, in view of the notice he had given to be prepared, to proceed with the cause when reached. Besides this, no showing of facts whatever is

disclosed in the affidavit as to the matter of defense. It is true the affidavit states in general terms that defendant had a meritorious defense to the action, but such is insufficient. Indeed, it amounts to no more than the expression of an opinion touching the matter and it may be that upon the facts relied upon as a defense being set forth they will disclose no defense whatever. In any view of the case it is defendant's duty to set forth the facts relied upon as its meritorious defense in order to invoke the judgment of this court as for an abuse of discretion in the premises.

The judgment should be affirmed. It is so ordered. All concur.

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WINNIE BOUILLON, Appellant, v. LACLEDE GAS  
LIGHT COMPANY, Respondent.

St. Louis Court of Appeals, May 17, 1910.

1. **ASSAULT AND BATTERY: What Constitutes Assault: Violent Language.** A wrongful entry into a residence by a gas company's agent, and the frightening of plaintiff, so as to cause a miscarriage, by using violent language toward her nurse, when the latter attempted to shut the agent out as directed by plaintiff, was not an assault upon plaintiff.
2. **TRESPASS: Entering House.** Although an agent of a gas company had the right to enter a basement where a gas meter was kept, he had no right to enter or pass through the flat of a person who was not a consumer of gas, for the purpose of gaining access to such basement.
3. **——: Damages: Consequences of Tort.** A trespasser is liable for such injuries as result naturally, necessarily, and proximately from his wrongful act.
4. **——: Collector Entering House Against Protest: Violent Language: Damages: Fright and Mental Anguish Recoverable Elements: Anticipation of Result.** Fright and mental anguish arising from a trespass to person or property, as well as a physical injury resulting from fright, are proper elements

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of damage in an action for trespass, whether or not the wrongdoer reasonably anticipated the result of his trespass; so that, where defendant's agent wrongfully entered plaintiff's flat to read a gas meter, which was in fact in a part of the house not occupied by plaintiff, and caused her to have a miscarriage by frightening her by the use of violent language to her nurse, plaintiff could recover damages for the miscarriage resulting from the fright, and mental anguish caused by the trespass, though defendant's agent did not know plaintiff was confined because of pregnancy.

5. **NEGLIGENCE: Damages: Fright and Mental Anguish.** In an action for negligence, no cause of action exists for a mere mental disturbance, such as fright or anguish, not resulting from a physical injury, unless it be under circumstances of malice, insult or inhumanity directed against the plaintiff.
6. **TRESPASS: Wilful and Malicious: Intent of Trespasser.** Where a trespass is wilful and malicious, or of such a character or committed under such circumstances as to render it liable to commit injury to person or property, the trespasser is liable to the person injured although he had no intent to do an injury.
7. **DAMAGES: Tort Actions: Remote Damages.** In cases of affirmative wrong, damages are not remote, as distinguishable from proximate, when they are directly traceable to the wrongful act of the tortfeasor.
8. **MASTER AND SERVANT: Wrongful Act of Servant: Liability of Master.** In order to render the master liable for the wrongful act of the servant, it is not essential the latter be specially authorized nor that the particular act complained of be necessary to the performance of his duties, but it will be sufficient if it appear that the agent was acting in the course of his employment, although outside of the master's instructions.
9. ———: ———: ———: **Master Held Liable.** The agent of a gas company authorized to read gas meters was acting within the scope of his employment in entering plaintiff's part of the flat and attempting to open the door for the purpose of reading a meter, though the meter was in fact in a part of the building not occupied by her, so as to make the company liable for physical injuries to plaintiff from the agent's use of violent language in attempting to enter.

Appeal from St. Louis City Circuit Court.—*Hon. Moses N. Sale, Judge.*

REVERSED AND REMANDED.

*P. P. Mason and A. A. Parson* for appellant.

(1) "Where the facts are in dispute or more than one inference can be drawn therefrom the question of the employee's negligence is for the jury, as is the cause of the injury, and whether the servant acted within the scope of his employment. If there is any evidence tending to prove the cause of action, from which different inferences may be drawn, or if there is a conflict in the evidence as to material issues, a nonsuit or directed verdict should not be granted." 26 Cyc., pp. 1576-7; *Gayle v. Mo. C. & F. Co.*, 177 Mo. 427. (2) The liability of the master for his servant's torts is not based upon any personal authority in the agent to do the act, but upon public policy, and that it is more reasonable when one of two innocent persons must suffer from the wrongful act of the third person, that the master, who has employed the servant in a position of trust and confidence, should suffer, than a stranger. *Chandler v. Gloyd*, 217 Mo. 412; *Barree v. Cape Girardeau*, 197 Mo. 391; *Chicago Herald Co. v. Bryan*, 195 Mo. 574; *Payne v. Railroad*, 105 Mo. App. 155; *Knowles v. Bullene*, 71 Mo. App. 341; *Regan v. Reed*, 96 Ill. App. 460. (3) Even the servant's failure to obey instructions will not relieve the master from liability for the tort of his servant committed within the scope of his employment. *Paint & Color Co. v. Conlon*, 92 Mo. 221; *Whitehead v. Railroad*, 99 Mo. 263; *Houck v. Railroad*, 116 Mo. App. 559; *Compher v. M. K. Tel. Co.*, 127 Mo. App. 553; *Dreyfus v. Railroad*, 124 Mo. App. 585. (4) Annoyance, vexation, indignity and mental anguish are elements of damage, as well as the actual physical pain caused by the bringing on of the miscarriage, and plaintiff was entitled to go to the jury on the evidence even though the court below was right in its notion that the physical damages by reason of the miscarriage were too



remote. *Railroad v. Flagg*, 43 Ill. 368; *O'Donnell v. Transit Co.*, 107 Mo. App. 34; *Caster v. Oster*, 134 Mo. App. 146; *Thurman v. Tel. Co. (Ky.)*, 14 L. R. A. (N. S.) 499; *Trigg v. Railroad*, 74 Mo. 153; *West v. Forrest*, 22 Mo. 344. (5) Violent demonstrations, angry quarreling, profane and boisterous conduct, within hearing of a sick person or one in a delicate condition, renders the guilty party liable for the damage caused by such conduct. *Phillips v. Dickerson*, 85 Ill. 12, 28 Am. R. 607; *Barber v. Reese*, 60 Miss. 906; *Hill v. Kimball*, 76 Tex. 210, 7 L. R. A. 618; *Mann B. Co. v. Dupre*, 54 Fed. 646; *Richberger v. Express Co.*, 73 Miss. 161; *Lesch v. Railroad*, 93 Minn. 435; *Brownback v. Frailey*, 78 Ill. App. 262; *Wyant v. Crouse (Mich.)*, 53 L. R. A. 626, 633; *Tunnicliff v. Railroad (Mich.)*, 32 L. R. A. 142.

*Percy Werner* for respondent.

(1) No cause of action is shown by the evidence. Defendant's servant at most was guilty of a disturbance of the peace for which he is personally responsible. Coarse or unbecoming language, unaccompanied by gestures indicating an intention to inflict bodily harm, does not constitute an assault, and the cause of action attempted to be set up certainly does not fall within any other subdivision into which actions arising out of torts are classified. 28 Am. and Eng. Ency. of Law (2 Ed.), p. 257; 2 Am. and Eng. Ency. of Law (2 Ed.), 957; *Stearns v. Sampson*, 59 Me. 568 (cases on Torts, Ames, Cambridge, 1893). (2) Whatever was said and done by defendant's servant, so far as complained of, was, according to the testimony, impelled by motives wholly personal to himself, and simply to gratify his own feeling of resentment, and was therefore not within the scope of his employment, and the principle of *respond-eat superior* does not apply. *Vogeli v. Pickle Co.*, 49 Mo. App. 623; *Hael v. Railroad*, 119 Mo. 325; *Harde-*

man v. Williams, 150 Ala. 415, 43 So. 726, 10 L. R. A. (N. S.), 653; Collette v. Rebori, 107 Mo. 711; Meehan v. Moorwood, 52 Hun 566. (3) The damages, physical effects flowing from agitation caused by the use of unbecoming or coarse language within the hearing only of, and not directed at the injured party, are too remote, especially where the effects are due to a poor physical condition which is unknown to the party charged with using the language, and where no maliciousness or wilfulness is charged, and the result could not reasonably have been foreseen. Francis v. St. Louis Transfer Co., 5 Mo. App. 7; Trigg v. Railroad, 74 Mo. 147; Strange v. Railroad, 61 Mo. App. 586; Deming v. Railroad, 80 Mo. App. 152; Connell v. Telegraph Co., 116 Mo. 34; Mitchell v. Railroad, 151 N. Y. 107; Phillips v. Dickerson, 85 Ill. 11; Victorian Ry. Com'rs v. Coultas, 13 App. Cs. 222.

NORTONI, J.—This is a suit for damages accrued through physical injuries which resulted from fright. At the conclusion of plaintiff's case the court directed a verdict for defendant and plaintiff prosecutes the appeal.

It appears that plaintiff, a married woman, resides in the lower flat at 812 North Jefferson avenue in the city of St. Louis and at the time in question was there sick in bed. She was pregnant with child and threatened with a miscarriage. She had been confined to her bed in care of a physician for about one month when, on October 16, defendant's agent came to the front door of her apartment and demanded admission for the purpose of reading the gas meter. It appears plaintiff did not use gas at all in connection with her household but a meter had been installed in the basement immediately under her flat in connection with the flat above, occupied by other tenants. Plaintiff testified that she heard some one knocking at the front door, which, it seems, was almost adjacent to the room in which she was con-

fined to her bed. Upon hearing loud raps at the door, she directed the nurse to answer the call. The nurse opened the door and defendant's agent said, "I am from the Laclede Gas Company and I came to read that meter." The nurse answered, "You can't come through here to-day, the lady is awfully sick here," to which the agent replied, "I have to read the meter." Thereupon plaintiff said to the nurse, "Cora, shut the door; it is getting awfully cold in here," and defendant's agent grabbed the door, saying, "Don't you shut the door on my hand." Plaintiff said to the nurse, "Shut the door on his hand if he don't take it out," and said to the defendant's agent, "You haven't any right to molest me when I am sick, and I don't use gas anyhow." To this defendant's agent replied, "By God, I don't know whether you do or not and I am going to find out. That is what I am going to find out." Plaintiff relates defendant's agent said "That is what he was there for, and that, by God, he was going to find out," and I said, "For mercy sake, Cora, shut the door," and he said "God damn it, don't you shut the door on my hand," and I said, "For goodness sake tell him to go around the back and go in the way he has been coming in," whereupon defendant's agent desisted his attempt to go through plaintiff's apartment and entered the basement by a side or back door as was proper.

The testimony discloses that the controversy between defendant's agent and plaintiff's nurse, at the door continued for probably five minutes; that as a result thereof plaintiff became greatly frightened and shocked and was seized immediately thereafter with a nervous chill. It seems that she had several chills during the evening and suffered a miscarriage on the following day as a result of the excitement and fright occasioned by the conduct of defendant's agent in unlawfully attempting to enter her apartment. The nurse who attended plaintiff at the time gave testimony to the same effect as plaintiff, and her physician testified

that in his opinion the miscarriage occurred as a result of the fright occasioned by the conduct of defendant's agent. It appears too that plaintiff was sick for a considerable period thereafter and that her health is permanently impaired as a result of the misfortune.

Defendant insists the facts relied upon present no cause of action known under the various heads of tort, unless it be for an assault, and then proceeds to point out why no assault on plaintiff is shown by the proof. No one can doubt that the case fails to disclose an assault on plaintiff as the controversy was principally had with, and all the insulting language directed against, another, the nurse. However this may be, the facts reveal a valid ground of liability on the score of trespass, and this is true notwithstanding the damages laid are not for the commission of the initial act of trespass, but relate instead to its consequence alone. Although defendant's agent had a right to enter the basement beneath plaintiff's apartment for the purpose of reading the gas meter, it is entirely clear that he had no authority to enter or pass through plaintiff's flat for that purpose. She was not a consumer of gas and the gas meter was in no sense connected with her household. Plaintiff is assured peaceful repose of her home against unwarranted intrusion from others. A trespasser is liable to respond in damages for such injuries as may result naturally, necessarily, directly and proximately in consequence of his wrong. This is true for the reason the original act involved in the trespass is unlawful. [Wyant v. Crouse (Mich.), 53 L. R. A. 626.] As to what matters do so result, depends upon the particular facts of each case. The consequence may be one thing in one case and something different in another; but be this as it may, if an injury is directly traceable to the unlawful invasion of plaintiff's right as the proximate cause, a recovery may be had therefor. It may be that fright is a necessary and natural result of a trespass committed upon one's dwelling by force or violence and that the

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fright so entailed occasions a physical injury. If such be the case, then the injury or damage entailed as a result of the fright occasioned in the first instance by the mode or manner of the trespass is regarded as consequential to the trespass. [Hickey v. Welch, 91 Mo. App. 4; McAfee v. Crofford, 54 U. S. 447, 13 Wall. 447; Lesch v. Great Northern, etc., Ry. Co., 93 Minn. 435; Brownback v. Frailey, 78 Ill. App. 262; Barbee v. Reese, 60 Miss. 906; Yoakum v. Kroeger (Tex. Civ. App.) 27 S. W. 953; Chicago, etc., Ry. Co. v. Hunerberg, 16 Ill. App. 187; Preiser v. Wielandt, 48 App. Div. N. Y. 569; 1 Cooley on Torts (3 Ed.), 95, 96, 97, 98.] The doctrine is that though a mere mental disturbance of itself may not be a cause of action in the first instance, fright and mental anguish are competent elements of damage if they arise out of a trespass upon the plaintiff's person or possession and may be included in a suit for the trespass if plaintiff chooses so to do, or, if a physical injury results from such fright, a cause of action accrues from the trespass for compensation as to the physical injury and its consequences alone, which may be pursued even though plaintiff seeks no compensation for the original wrong. [Hickey v. Welch, 91 Mo. App. 4; Larson v. Chase, 47 Minn. 307; Meagher v. Driscoll, 99 Mass. 281.]

In instructing a verdict for defendant, it seems the trial court acted upon the general rule which obtains with respect to negligent torts as though the damages sought to be recovered were remote. It must be conceded that in such cases no cause of action exists for a mere mental disturbance, such as fright or anguish not resulting from a physical injury, unless it be in circumstances of malice, insult or inhumanity directed against the plaintiff. [Trigg v. St. Louis, etc., Ry. Co., 74 Mo. 147; Connell v. Western Union Tel. Co., 116 Mo. 34, 22 S. W. 345.] And it is true it does not clearly appear in this case that the words of insult were directed against the plaintiff personally. In other words, the

profane epithets and the disturbance of the peace, though in plaintiff's hearing, it seems, were more particularly directed against her companion, the nurse. However, the rule denying compensation for mere mental disturbance unaccompanied by physical injury is said to be confined to cases other than affirmative wrongs such as trespass and intentional or wanton torts. [Preiser v. Wielandt, 48 App. Div. N. Y. 569; 62 N. Y. Supp. 890; Hick v. Welch, 91 Mo. App. 4, 13; 1 Cooley on Torts (3 Ed.) 97; 1 Sutherland on Damages (3 Ed.), sec. 44.] Recoveries are therefore properly allowed in cases where no violence or insult is directed against the plaintiff in person, if it appears physical injury has resulted from fright occasioned by defendant when in the act of committing a trespass upon her possessions. In Watson v. Dilts, 116 Ia. 249, the defendant entered plaintiff's house in the nighttime and stealthily passed to an upstairs room where he engaged in a physical encounter with a member of plaintiff's family, the result of which operated to frighten plaintiff and occasioned a subsequent miscarriage. In giving judgment on the case, the court expressed the opinion that although the assault was not directed against plaintiff and no physical injury was inflicted in the first instance, defendant was liable to respond for such consequences as were proximate to his wrongful act in committing the trespass. So, too, in Hill v. Kimbell, 76 Tex. Sup. 210, 7 L. R. A. 618, 13 S. W. 59, defendant, who was plaintiff's landlord, entered upon the premises in her possession and chastised two negroes with such severity in her presence as to occasion great fright and emotions of the mind which operated to induce a miscarriage. The Supreme Court said that though the assault was not upon plaintiff, it occurring as a result of a trespass on her premises, the defendant should respond in damages even though it was unaccompanied in the first instance with physical injuries as to her. Indeed, the rule is that where the trespass is willful and malicious or of such a char-

acter or committed under such circumstances as to render it liable to commit injury to person or property, the trespasser is liable to any person injured and it is not necessary that he should intend to do such injuries. [4 Sutherland on Damages (3 Ed.), sec. 1029.]

There are cases which go to the effect that before plaintiff may recover as for a miscarriage caused by fright it must appear the defendant was aware of her condition and notwithstanding such knowledge occasioned the fright by entering into an altercation in her presence. These authorities proceed as though no obligation rests upon defendant to respond except it appear he breached the obligation to exercise ordinary care. That is to say, they proceed as though no damages may be recovered unless it appear that defendant was in a position to anticipate the particular result as a probable sequence of the fright. See *Phillips v. Dickerson*, 85 Ill. 11; *Reed v. Ford* (Ky.), 112 S. W. 600; *Brownback v. Frailey*, 78 Ill. App. 262; 1 Cooley on Torts (3 Ed.), 94, 95, 96, 97, 98. This doctrine is no doubt correct enough with respect to those cases where the injury is inflicted under circumstances apart from a trespass or other legal wrong against the person or possessions of the plaintiff. But it seems the rule of ordinary care should find no application to a case where it appears the fright is occasioned as a result of a trespass against the person of the plaintiff such as an assault on her, as in *Barbee v. Reese*, 60 Miss. 906; *Mann Boudoir Car Co. v. Dupre*, 54 Fed. 646, 21 L. R. A. 289; *Hickey v. Welch*, 91 Mo. App. 4; nor where the fright is the result of a trespass against the home or possession of the plaintiff and engaging in an encounter with a third party therein, as in *Watson v. Dilts*, 116 Ia. 249; *Lesch v. Great Northern, etc., Ry. Co.*, 93 Minn. 435; *Mann Boudoir Car Co. v. Dupre*, 54 Fed. 646, 21 L. R. A. 289. Indeed, it is said in some cases where it appears there is a legal wrong against the right of the plaintiff, such as negligence, a recovery may be had for

physical injuries resulting from fright even though the sick or enfeebled condition of plaintiff was wholly unknown to the wrongdoer. [Purcell v. St. Paul City Ry. Co., 48 Minn. 134; Sanderson v. Northern Pac. Ry. Co., 88 Minn. 162; 1 Cooley on Torts (3 Ed.), 97.]

When the injury results from a trespass, as in this case, the trespasser will be required to respond for all consequences which are the natural and probable result of the act complained of in the circumstances of the particular case, and it is not essential that the wrongdoer may be able to anticipate who the particular sufferer may be. [1 Sutherland on Damages (3 Ed.), sec. 25.] In other words, when the defendant is a trespasser, either against the person or the apartment of the plaintiff, it is not essential to the cause of action that he should know her condition to the end of conducting himself in accordance with the requirements of ordinary care for her safety. [Watson v. Dilts, 116 Ia. 249; Mann Boudoir Car Co. v. Dupre, 54 Fed. 646, 21 L. R. A. 289.]

It is true in this case the nurse disclosed to defendant's agent at once that plaintiff was sick in the house and of that matter full notice was given, but the fact that she was confined to her bed because of pregnancy was not communicated. Be this as it may, it is entirely clear defendant is not to escape responsibility on this score, for as a trespasser in her home it should respond for all consequences traceable to its wrong as the proximate cause thereof. In cases of affirmative wrong, damages are not remote, as distinguishable from proximate, when they are directly traceable to the wrongful act of the tortfeasor. In other words, the privacy of a home enjoys the sanctity of the law. A trespasser must anticipate that persons may be there sick or in a delicate state of health and liable to suffer injury from gross misconduct on his part. [Watson v. Dilts, 116 Ia. 249; 1 Cooley on Torts (3 Ed.), 99 to 106.]



It is conceded by defendant that the agent complained of was its representative and it appears he was then engaged in defendant's service in the line of his duty in so far as attempting to obtain an entrance to the gas meter was concerned. But it is argued that for the time being the agent overstepped his authority and entered into a controversy on his own account with plaintiff's nurse. The rule is, that if it appears the agent is authorized to do the act, the master is liable for the consequences of his doing it in a different manner, if the mode adopted by him is so far incident to the employment that it comes within its scope, for, having given the agent authority to go about in reading its gas meters, the master must respond for the manner in which he abuses it. In order to render the master liable for the wrongful act of the agent, it is not essential that he be especially authorized or that the particular act complained of shall be necessary to the performance of his duties. It will be sufficient if it appears that the agent was acting in the course of his employment, although outside of the master's instructions. The agent in this case was clearly acting in the line of his duty for defendant and although he resorted to a method or manner of serving his master not authorized, defendant is bound to answer for his conduct in the premises. For the general doctrine, see *Garretzen v. Duenckel*, 50 Mo. 104, 112, 11 Am. Rep. 405; *Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770; *Voegeli v. Pickel Marble, etc., Co.*, 49 Mo. App. 643; *Chandler v. Gloyd*, 217 Mo. 394, 413, 116 S. W. 1073. For an authority directly in point as to a wilful wrong committed by the servant while executing the employment assigned, even in an unlawful manner and beyond its implied obligation, see *Haehl v. Wabash R. Co.*, 119 Mo. 325, 24 S. W. 737. In that case defendant's servant was a watchman engaged on the Wabash railroad bridge across the Missouri river at St. Charles. Plaintiff's husband, a pedestrian, was in the act of crossing defendant's bridge and its watch-

man in the execution of his duty forbade him to further proceed. Some controversy in words evidently ensued and the pedestrian retraced his steps as though he were leaving the bridge in the direction from whence he came. Defendant's watchman followed and, it is said, wrongfully shot plaintiff's husband in the back, so that death resulted. At the suit of the widow of deceased against the railroad company, under our statute giving an action for the wrongful death of a husband, the Supreme Court declared even though the wrongful act of the watchman was willful and involved an affirmative violation of the law on his part, it was one for which the defendant should respond, as the act was performed in executing the duty assigned the watchman by his master, though it was beyond the implied duty of the employment as a watchman. The case extends the principle of *respondeat superior* even beyond the point essential to sustain the defendant's liability to respond on account of the act of its servant involved here, for there it seems the watchman had sufficiently performed his duty by causing the pedestrian to retrace his steps without following after, while in this case, the servant committed the entire trespass while insisting upon his right to pass through plaintiff's apartment to the end of reading the meter. Aside from the reprehensible and unlawful conduct of the servant, this was the execution of the very act defendant had employed him for and bade him to do. Having delegated authority to its servant to perform the act of reading meters, defendant must respond for the mode and manner in which he performed it even though it be both willful and unlawful.

The judgment should be reversed and the cause remanded. It is so ordered. All concur.

JOHN GIBLER, Respondent, v. QUINCY, OMAHA  
& KANSAS CITY RAILROAD COMPANY, Ap-  
pellant.

St. Louis Court of Appeals, May 17, 1910.

1. **NEGLIGENCE: Pleading: Res Ipsa Loquitur: Effect of Pleading Specific Negligence.** By pleading specific acts of negligence, plaintiff asserts his ability to prove the same as laid, and for that reason he is required to do so, even though the doctrine of *res ipsa loquitur* might apply under a general allegation unaccompanied by averments of such specific acts.
2. **MASTER AND SERVANT: Railroads: Negligence: Injury to Servant: Specific Negligence not Presumed from Uncoupling of Train.** In an action against a railroad company by a servant for personal injuries, evidence that a train upon which plaintiff was riding became uncoupled, causing a sudden and violent shock which threw plaintiff over, in no manner tends to support a specific charge that the engineer was so remiss in his duty as to occasion the uncoupling.
3. **NEGLIGENCE: Railroads: Res Ipsa Loquitur: Doctrine Applies When.** The doctrine of *res ipsa loquitur* applies where it appears a railroad train is under the management of defendant and the accident is such as in the ordinary course of events does not happen if those managing the conveyance use proper care; the accident under such circumstances affording reasonable evidence, in the absence of explanation of defendant, that it arose from want of care on the part of defendant.
4. **MASTER AND SERVANT: Railroads: Negligence: Res Ipsa Loquitur: Fellow-Servants.** The mere fact that the plaintiff is a servant of the defendant will not prevent the application of the doctrine of *res ipsa loquitur* in an action for personal injuries against a railroad company by one of its employees, especially in view of section 2873, Revised Statutes 1899, which abrogates the doctrine of fellow-servants as to railroad employees.
5. ———: ———: ———: **Fellow-Servants: Who Are Within Statute.** One repairing bridges for a railroad company, if injured while in the line of duty, though not actually engaged in work on a bridge, is within the scope of section 2873, Revised Statutes 1899, abrogating the doctrine of fellow-servants as to railroad employees.

6. ———: ———: ———: *Res Ipsa Loquitur* Applies to Facts Stated. The uncoupling of a freight train while running at a rate of twenty or twenty-five miles an hour is such an unusual and extraordinary occurrence as to bespeak the want of due care on the part of defendant in some respect or somewhere; but it does not tend to prove negligence on the part of the engineer so as to sustain a specific averment of negligence on the part of the engineer, charged in the petition.
7. NEGLIGENCE: Pleading: *Res Ipsa Loquitur*: Effect of Pleading General and Specific Negligence. Where there is a general allegation in the petition as to the negligent breach of duty, accompanied by averments of specific acts of negligence touching the same subject-matter, the rule of *res ipsa loquitur* will not apply, for by going into the specification of negligent acts, plaintiff has shown his familiarity with the grounds of liability involved and indicated not only his purpose but his ability to prove the same as laid.

Appeal from Knox Circuit Court.—*Hon. Chas. D. Stewart*, Judge.

REVERSED.

*O. D. Jones* and *J. G. Trimble* for appellant.

(1) Plaintiff's instruction one is erroneous. (a) In instruction number 1, the court declares that plaintiff was a passenger. He was riding free and the defendant was paying him for his services at the time he was upon the train. He worked in the forenoon, he worked that afternoon, he was an employee and not a passenger. He comes within the rule laid down by this court in *St. Clair v. Railroad*, 122 Mo. App. 519. (b) Plaintiff charges specific acts of negligence, to-wit: The engineers ran the train recklessly, wantonly, carelessly and negligently at a high and dangerous rate of speed; and negligently and carelessly permitted the engines to become "uncoupled." On this very same evidence, the court, in reversing and remanding this case (129 Mo. App. 93), declared there was no evidence that the speed was unusual or dangerous, and that there was

no evidence that the engineers were reckless and negligent. In instruction number 1 the court omits the charge that the engineers negligently permitted the train to become uncoupled, but says that if the engineers carelessly and negligently handled the engines so as to cause a sudden and terrific shock, the company is liable. It is true plaintiff attempted to make a general charge of negligence in the handling of the train, but he preceded that with specific charges, and the general charge must give way to the specific ones, and, as held by this court on the former hearing, the instruction leaves out the act of negligence charged in the petition.

(2) It was error to refuse instructions 1 and 2, asked by the defendant and refused by the court. (a) In the first instruction, the defendant asked the court to declare as a matter of law that there was no evidence that the engineers handled the train recklessly, wantonly, carelessly and negligently. There was no such evidence. Plaintiff relied entirely upon the happening of the accident without any proof that the engineers were responsible for it, and there was direct, positive evidence from several witnesses that the uncoupling, or breaking in two of the train, was a common occurrence over which the engineer has absolutely no control. "When there is no evidence as to a given point, the court properly instructs to that effect." *Ryan v. Kelley*, 9 Mo. App. 592. (b) The court should have given instruction number 2 for the reason that it submitted to the jury the question of plaintiff's negligence in taking an exposed position. Plaintiff not having covered the question of his own negligence (which was the defense in the case), the court should have given an instruction asked by defendant based upon plaintiff's negligence. The case comes to the court now with the same infirmity it had before when this court held that plaintiff's instruction was erroneous in not submitting to the jury the question of his negligence.

*G. R. Balthrope, C. M. Smith and F. H. McCullough* for appellant.

(1) The case of *Gibler v. Railroad*, 129 Mo. App. 93, is the law of this case. Every instruction given by the court on behalf of plaintiff was approved by GOODE, J., in his well written opinion upon the first appeal, the entire court concurring. (2) The charge of negligence in the case, is general as well as special, and where a general charge of negligence is preferred, then proof of the accident makes a *prima facie* case. *Gibler v. Railroad*, 129 Mo. App. 100; *Feary v. Railroad*, 162 Mo. 75, 96; *Briscoe v. Railroad*, 222 Mo. 104.

NORTONI, J.—This is a suit for damages accrued to plaintiff on account of the alleged negligence of defendant. Plaintiff recovered and defendant appeals.

It appears plaintiff was one of a party of six engaged in defendant's service as bridge carpenters. On the day of his injury, plaintiff, together with his companions, had been working adjacent to the city of Edina. Defendant had furnished the bridgemen three cars to be used in connection with their duties. One of these cars was an ordinary freight car containing bunks for sleeping purposes, cooking utensils, tables, chairs, etc., and was known as the "bunk" and "dining" car. Another was a freight car on which they transported materials necessary to the repair of bridges. The third was what is known as a flat car and was used by plaintiff and his companions as a conveyance for their tools and some supplies.

It becoming necessary for the party to remove from Edina to the town of Brashear, the three cars mentioned were included in one of defendant's trains for that purpose. As the two towns mentioned are situate a short distance apart, plaintiff and two of his companions took passage on the flat car used by them as a conveyance for their tools instead of going into the other known as

the "bunk" car. The train into which the three cars of the bridgemen were taken seems to have been a very long one, consisting of about sixty cars in all. It was propelled by two locomotive engines. Thus made up, it constituted what is commonly known among railroad men as a "double header." Instead of the two locomotives being connected, however, they were separated by a freight car between them, and the two engines, thus separated, were drawing the long train in question.

Immediately upon leaving the city of Edina to the westward is a heavy grade on defendant's road. After passing the summit of this, the train descends another considerable grade into a swale on the roadbed and then comes another grade to the westward. The three cars of the bridgemen were placed in the train near the rear end thereof and, as stated, plaintiff, in company with two of his companions, was standing on the flat car which they used as a conveyance for their tools and a few supplies. The plaintiff stood a few feet from the forward end of this car as the train progressed westward and his fellow workman, Montcrief, was close by his side. After passing over the summit of the first grade west of Edina, the train descended the incline to the swale of the track with considerable rapidity, and upon the forward part thereof ascending the next grade to the west it became uncoupled between the two locomotives. Just where or how this uncoupling occurred does not appear but it is said in the proof that it was between the two locomotives which, as before stated, were separated only by a freight car. The entire train as far back as the cars occupied by the bridgemen was equipped with airbrakes so that they worked automatically upon the occurrence of the uncoupling mentioned. It appears that instantly upon the forward locomotive becoming uncoupled from the remainder of the train the brakes were automatically set on all of the cars back to the one on which plaintiff and his companion were riding. Of course, this produced a sudden and

violent stoppage of the train without warning. The three cars used by the bridgemen were not equipped with air, hence including them in the train operated to dis-sever the current, so that the half dozen cars in the rear ran forward as though no brakes were attached. The result was such a sudden and violent shock as to precipitate plaintiff immediately forward off of the flat car on which he was standing. It is said that he would have fallen on the rail of the track except for the fact that Montcrief, his companion, laid hold of his coat with his hand in an effort to prevent a catastrophe and thus directed his fall to the side of the railroad embankment. Plaintiff fell with great force upon his neck, shoulder and arm, and the testimony is that he received a painful injury which may prove to be permanent.

Besides containing a general allegation of negligence in operating the train, the petition contains two specific allegations as to the negligent acts relied upon. The case was here on a former appeal and is reported *Gibler v. Q. O. & K. C. R. Co.*, 129 Mo. App. 93, 107 S. W. 1021. The petition before us on the former appeal was in part the same as the one now in judgment except for the fact it contained an allegation to the effect the airbrakes were defective and unsafe. After the case was remanded, the present amended petition was filed and the averments touching the matter of defective and unsafe airbrakes omitted. Otherwise the pleading predicates upon the same grounds of negligence as theretofore and a general allegation of negligence is included. In the present petition it is averred, first, substantially that defendant was negligent in recklessly, wantonly, carelessly and negligently running its train at a high and dangerous rate of speed. It may be said of this allegation, however, that although it abundantly appears the train was being operated at from twenty to twenty-five miles per hour, there is not a scintilla of proof that such was a dangerous rate of speed. Indeed, this allegation of negligence is not only unproven but was aban-



done by the plaintiff at the trial, for it appears that he requested the court to refer to the jury only the question of negligence touching the conduct of the two engineers. This being true, we will omit further notice of the specification of negligence as to a dangerous rate of speed. The second specification of negligence relied upon in the present petition relates to the conduct of the two engineers in operating the train, and proceeds to aver that they were remiss in respect of their duty in such manner as to occasion the uncoupling which operated to automatically set the brakes and hurl plaintiff to his injury. Touching this matter, it is averred "said engineers, agents and servants of defendant, in charge of said engines and train of cars of defendant, negligently and carelessly permitted said two engines to become uncoupled and separated from said train of cars and from each other, thereby severing the airbrake connections between said engines and said train of cars," etc. As before stated, the other allegation is general in character and relates to the agents and servants of defendant in charge of the engines and train, etc. It charges that they so negligently handled and operated the engines and train as to cause a terrific shock and jar, etc.

When the cause was here on the former appeal, the court entertained some doubt as to whether or not plaintiff has shown a prima facie right of recovery. As before stated, the petition in judgment then pleaded several specific acts of negligence. Upon carefully examining the proof, it was ruled wholly insufficient on all of the specifications but one and that was the charge that the engineers carelessly, etc., permitted the train to become uncoupled. It appeared that one witness, Forrester, testified on that trial the engineers handled the train very roughly. On this statement of one witness, a mere scrap of testimony, considered together with the circumstances of an exceedingly long train

drawn by two locomotives separated by a car between, we expressed the opinion that a prima facie case was made for the jury as to whether or not the engineers were remiss in their conduct. It was said, too, on that appeal, that if plaintiff's charge of negligence had been general, likely proof of the accident alone would have made a prima facie case, but as he did not prefer a general charge of negligence in handling the train, it therefore devolved upon him to prove the specific acts of negligence laid in the petition. See *Gibler v. Q. O. & K. C. R. Co.*, 129 Mo. App. 93, 107 S. W. 1021.

It is to be inferred from subsequent conduct of counsel in amending their petition so as to include a general allegation of negligence that they sought to so form the pleadings as to invoke the doctrine of *res ipsa loquitur*. Such was a proper course to pursue and would no doubt have prevailed, had the averments of specific negligent acts been omitted from the amended petition. [*Briscoe v. Met. Street Ry. Co.*, 222 Mo. 104, 120 S. W. 1162.] The inference that counsel included the general allegation of negligence in the amended petition with a purpose to invoke the doctrine of presumptive negligence is re-enforced from the fact that it appears they wholly omitted to introduce any evidence whatever on the present trial tending to show the specific negligent acts charged against the engineers or those in charge of the train and now rely upon the doctrine of *res ipsa loquitur*. Indeed, it is argued here that as the present petition contains a general allegation of negligence in addition to the specific charges mentioned plaintiff was not required to prove more than the fact of the accident and the circumstances of the case to make a prima facie showing of liability. And it is said such is the law of this case as determined on the former appeal. No such question was presented when the case was here before and no such judgment was given. The case then before the court was one predicated upon three charges of specific negligence and

it was ruled that as plaintiff had seen fit to specify the negligent acts relied upon, it devolved upon him to prove the same. In other words, in that state of the pleading, it was ruled the doctrine of *res ipsa loquitur* could not be invoked, and in the course of the opinion it was merely remarked that had the allegations of negligence been general, instead of specific, the fact of the accident likely would have made a prima facie case. There is not a word in the opinion on the former appeal which goes to indicate that plaintiff might aver in his petition the specific acts of negligence relied upon together with a general charge touching the same matter and then invoke the doctrine of *res ipsa loquitur*. Indeed, all of the authorities in this State with which we are familiar are to the effect that by pleading specific acts of negligence the plaintiff thereby asserts his ability to prove the same as laid and for this reason he is required to do so even though the doctrine of *res ipsa loquitur* might apply under a general allegation unaccompanied by averments of such specific acts.

There is no proof in the present record tending to establish any specific act of negligence against the engineers or any other person for that matter. The few words of the one witness to the effect that the engineers handled the train very roughly, which, together with the circumstances of the long train and two locomotives, we determined to be sufficient prima facie on the prior appeal, are not to be found in the testimony given at the last trial. There is testimony to the effect that the train became uncoupled as detailed above and that this occasioned a sudden and violent shock which precipitated plaintiff forward to his injury. But this testimony in no manner tends to support the specific charge that the engineers were remiss in their duty so as to occasion the uncoupling and no specific charge is laid against any other of defendant's agents. In a manner, plaintiff concedes the insufficiency of the testimony to establish the specific negligence alleged and seems to

rely entirely upon the doctrine of *res ipsa loquitur*. The doctrine of *res ipsa loquitur* applies in proper cases where it appears the train is under the management of the defendant and the accident is such as in the ordinary course of things does not happen if those managing the conveyance use proper care. In such circumstances, it affords reasonable evidence in the absence of explanation by defendant that the accident arose from a want of care on the part of defendant. In other words, in those circumstances the occurrence itself affords a presumption sufficient as prima facie proof of the fact of some negligence. [Mitchell v. Chicago & Alton Ry. Co., 132 Mo. App. 143, 112 S. W. 291; Trotter v. St. Louis & Suburban Ry. Co., 122 Mo. App. 405, 99 S. W. 508.] Except for the state of the pleading which now precludes it, there is no good reason why the doctrine should not apply in the circumstances of this case even between master and servant, especially in view of our statute abrogating the old doctrine of fellow service as to railroad employees. It seems the only sound and intelligent reason which may be given for precluding the application of the doctrine *res ipsa loquitur* as between master and servant in a proper case is that although the occurrence bespeaks negligence as to some one or some where, it does not of itself exclude the idea that the negligent act is that of a fellow-servant for whose conduct the master is not answerable. In other words, as between master and servant, though the occurrence of itself indicates a want of ordinary care, it does not necessarily point the negligence of some person superior in authority or in respect of a defect in construction for which the master should respond notwithstanding the doctrine which obtains exempting him for the negligent acts of fellow-servants which an employee assumes. An instructive opinion by a great court may be found in Kansas, Pacific Ry. Co. v. Salmon, 11 Kan. 83. In this State the common-law rule as to fellow-servants with regard to those engaged in operating a railroad has

been abrogated by statute, sections 2873, Revised Statutes 1899, section 2873, Ann. St. 1906, and it has been decided that one repairing bridges for a railroad company, if injured while in the line of duty, though not actually engaged in work on a bridge, is within the beneficial influence of the statute. [Callahan v. St. Louis Merchants' Bridge, etc., Co., 170 Mo. 473, 71 S. W. 208.]

It therefore appears that the mere fact of the relation of master and servant furnishes no valid reason for denying the application of the doctrine of presumptive negligence in this case. Both the Kansas City Court of Appeals and this court have heretofore given judgment to the effect that the relation of master and servant alone does not exclude the doctrine as to railroad employees in a proper case. See Shuler v. O. K. C. & E. Ry. Co., 87 Mo. App. 618; St. Clair v. St. Louis, etc., R. Co., 122 Mo. App. 519, 99 S. W. 775. Furthermore, our Supreme Court applied the doctrine as between master and servant in a case not within the influence of our fellow-servant statute, when the fact of the sudden starting of the machine which occasioned the injury indicated want of care in construction and precluded the idea of non-liability on the score of fellow service. See Blanton v. Dold, 109 Mo. 64, 74, 75, 18 S. W. 1149. Another case where the doctrine was applied between master and servant is Haas v. St. Louis & S. R. Co., 111 Mo. App. 706, 90 S. W. 1155.

We do not hesitate to express the opinion, as was done on the former appeal, that the doctrine referred to might have been invoked by plaintiff had he relied solely upon a general charge of negligence against defendant, for it seems that the uncoupling of a freight train in the circumstances stated, while running over the tracks at the rate of twenty or twenty-five miles an hour is such an unusual and extraordinary occurrence as to bespeak the want of due care on the part of the defendant in some respect or somewhere. It may be the

negligence was in the operation of the locomotives or it may be in the construction or defective condition of the couplings or it may lie in the defective condition of the roadbed, but though the fact in and of itself indicates negligence no one can say that it points to the engineer as the negligent party. As suggested, the fact may point negligence but what particular negligence it indicates is another question. The plaintiff in his petition points to the negligent acts of the engineers as those upon which he relies for a recovery and fails to give any proof to sustain the charge. It is clear enough that although the fact of the accident bespeaks negligence, no one can say that of itself it indicates or tends to prove negligence in the engineer any more than it tends to prove negligence in the condition or construction of the couplings.

The general rule obtains to the effect that the specific acts of negligence pleaded and relied upon for recovery must be proved. [Waldhier v. H. & S. Jo. R. R. Co., 71 Mo. 514; Price v. St. Louis, etc., Ry. Co., 72 Mo. 414; Bunyan v. Citizens' Ry. Co., 127 Mo. 12, 29 S. W. 842; Ely v. St. Louis, etc., Ry. Co., 77 Mo. 34; McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872; Orcutt v. Century Building Co., 201 Mo. 424, 99 S. W. 1062; Beave v. St. Louis Transit Co., 212 Mo. 331, 111 S. W. 52.] In proper cases when the allegation of negligence is general in character only and unaccompanied by a recital of the specific acts which go to the breach of duty relied upon, the doctrine of *res ipsa loquitur* may be invoked. The rule permitting a presumption of negligence to suffice for plaintiff proceeds on the theory that it is easily within the means of defendant to show there was no dereliction on his part, if such be the fact, while the plaintiff would labor under a great disadvantage if the burden to show the particular acts of negligence continued with him. [Roscoe v. Met. Street Ry. Co., 202 Mo. 576, 101 S. W. 32; Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 S. W. 1062;

Feary v. Met. Street Ry. Co., 162 Mo. 75, 62 S. W. 452; Malloy v. St. L. & S. R. Co., 173 Mo. 75, 73 S. W. 159; Gibler v. Q. O. & K. C. Ry. Co., 129 Mo. App. 93, 107 S. W. 1021; Briscoe v. Met. Street Ry. Co., 222 Mo. 104, 120 S. W. 1162.]

There can be no doubt that one may join in his petition an allegation of general negligence with averments of specific acts touching the same matter of complaint. But when the petition contains a general allegation of negligence and proceeds to aver specific matters of fact as to the manner in which the mishap occurred, the specific averments are preferred and take precedence over the general allegation as to the same subject-matter, and plaintiff is therefore required to prove the specific allegations of fact as laid. The authorities all go to this effect. See Mueller v. La Prelle Shoe Co., 109 Mo. App. 506, 84 S. W. 1010; McManamee v. Missouri Pac. Ry. Co., 135 Mo. 440, 37 S. W. 119; Waldhier v. H. & St. J. R. Co., 71 Mo. 514. From these premises, it is determined and the rule of practice obtains to the effect that where there is a general allegation in the petition as to the negligent breach of duty and it is accompanied by averments of specific acts of negligence touching the same subject-matter, the rule of *res ipsa loquitur* will not apply, for by going into the specification of negligent acts plaintiff has shown his familiarity with the grounds of liability involved and indicated not only his purpose but his ability as well to prove the same as laid. See Evans v. Wabash R. R. Co., 222 Mo. 435, 121 S. W. 36.

Indeed, the general doctrine above referred to is portrayed in all of the cases where the verdict is sought to be sustained on the theory *res ipsa loquitur*. In other words, in every case whether the petition contains a general allegation of negligence or not, if the averments point to the specific negligence relied upon for a recovery, the plaintiff is required to prove the same as laid and the doctrine of presumptive negligence may

not be invoked. By averring specific negligence, plaintiff indicates his purpose to prove the same and defendant is required only to defend against the acts of the particular negligent party pointed out in the pleading—in this case, the engineers and those in charge of the train. See the following cases in point: *Orcutt v. Century Bldg. Co.*, 201 Mo. 424, 99 S. W. 1062; *Roscoe v. Met. Street Ry. Co.*, 202 Mo. 576, 101 S. W. 32; *McGrath v. St. Louis Transit Co.*, 197 Mo. 97, 94 S. W. 872; *Potter v. Met. Street Ry. Co.*, — Mo. App. —, 126 S. W. 209; *Evans v. Wabash R. R. Co.*, 222 Mo. 435, 121 S. W. 36; *Beave v. St. Louis Transit Co.*, 212 Mo. 331, 111 S. W. 52.

It therefore appears, in view of the allegations of his petition, that plaintiff may not invoke the doctrine of *res ipsa loquitur*, even though his petition contains a general allegation of negligence, for the reason he saw fit to accompany such general allegation with specific allegations of negligent acts touching the same subject-matter. Having chosen to thus specify the engineers and others in charge of the train as the negligent persons, he must prove the fact as laid in order to make a prima facie case, otherwise there appears a total failure to carry the burden which the law casts upon him. Having failed to prove any negligent acts whatever against the engineers or others in charge of the train, the judgment is unsupported by the evidence and should be reversed. It is so ordered. All concur.



THOMAS J. DOMAN, Appellant, v. L. BAYLOR  
PENDLETON, Respondent.

St. Louis Court of Appeals, May 17, 1910.

**PRINCIPAL AND AGENT:** Contract With Agent: Liability of Agent. In an action for damages for refusal to permit plaintiff to carry out a contract to excavate and remove dirt from a lot on which defendant, as architect, was supervising the erection of a building for another, where plaintiff testified he understood the house and lot belonged to the principal and that defendant was there for the purpose of putting up the building as architect and that he was agent for the property and represented the owner, defendant could not be held on the theory he was personally bound because he did not disclose to plaintiff who the principal was.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. H. Williams*, Judge.

**AFFIRMED.**

*King & King* for appellant.

The agent is personally bound when he contracts in his own name or when he does not disclose his principal, or when he exceeds his powers. 1 Am. and Eng. Ency. of Law, pp. 1122, 1124; Central Law Journal, vol. 70, p. 49; Carpet Co. v. Crawford, 127 Mo. 356; Potter v. Bassett, 35 Mo. App. 417; Hamlin v. Abell, 120 Mo. 188; Hovey v. Pitcher, 13 Mo. 191; Blakeley v. Benecke, 59 Mo. 193; Sessions v. Block, 40 Mo. App. 569; Provenchere v. Reifess, 62 Mo. App. 50; Crum v. Boyd, 9 Ind. 289; Barrett v. Railroad, 9 Mo. App. 226; Hadley v. Satterlin, 64 Mo. App. 629; Argessenger v. McNaughton, 114 N. Y. 539, 540.

*L. L. Leonard* for respondent.

(1) The question involved is whether or not the demurrer to the evidence was properly sustained. In other words, did plaintiff fail to make out a case? If

so, the court properly took the case from the jury and it is immaterial upon what grounds the court based its action. *Pope v. Boyle*, 98 Mo. 531; *Zeigler v. Fallon*, 28 Mo. App. 298. (2) "In general, when a person acts and contracts avowedly as the agent of another, who is known as the principal, his acts and contracts, within the scope of his authority, are considered the acts and contracts of the principal and involve no personal liability on the part of the agent. The presumption is that an agent always intends to bind his principal and not himself." 1 Am. and Eng. Ency. of Law, pp. 1119, 1120; *Ashley v. Jennings*, 48 Mo. App. 146; *Anderson & Co. v. Stapel*, 80 Mo. App. 123. (3) When a contract is let for work, to be performed under great need of haste and an early date of beginning same is agreed upon, then time is the essence of the contract. And a failure to begin the work on the date specified is a breach and releases the co-obligor from all liability on the contract. *Fitzgerrell v. Hayward*, 50 Mo. 516; *Trust Co. v. York*, 81 Mo. App. 342; 2 Mo. Digest, sec. 141-143. (4) "Prospective or anticipated profits are not recoverable on account of their inherently uncertain and conjectural character." 8 Am. and Eng. Ency. of Law, 616; *Wilson & Sons v. Russler & Gnagi*, 91 Mo. App. 281, *et seq.*; *Taylor v. Maguire*, 12 Mo. 317; *Steffan v. Railroad*, 156 Mo. App. 335.

GOODE, J.—This plaintiff asked \$175 as damages for the refusal of the defendant to permit plaintiff to carry out a contract alleged to have been made between the parties for the excavation and removal of earth from a lot in the city of St. Louis. Defendant was the architect of a residence erected by Mr. Culver in Kingsbury Place and appears to have had authority to make a contract for excavating around it. Plaintiff was doing such work on another lot in the vicinity, and, having learned from a gardener in Kingsbury Place, earth would need to be removed from the Culver lot and the

architect would let the contract for it, he approached defendant for the job. Plaintiff testified defendant told him there would be about six hundred loads and they agreed the work should be done for sixty cents a load. Defendant promised to be out the next morning and discuss with plaintiff some extra work on the site of the garage; but that night plaintiff's wife became ill and he did not meet defendant in the morning as agreed. Plaintiff sent his foreman to the Culver lot the next morning without first seeing defendant, and the former began work, but was stopped by defendant, and the latter afterwards told plaintiff he had engaged some one else for the job. Plaintiff offered to carry out the contract, and, permission being refused, brought this action to recover the profit he would have made. The court below directed a verdict for defendant, and on the appeal this ruling is questioned upon the theory that defendant, though the agent of Culver, was personally bound, because he did not disclose to plaintiff who the principal was. Counsel for plaintiff says there is nothing in the testimony to prove defendant told plaintiff he was making the contract for or on behalf of any one else. Plaintiff himself testified he understood from the gardener, who first spoke to him about the work, the house and lot belonged to Mr. Culver, and that Pendleton was there for the purpose of putting up the building as architect. When asked if he understood Pendleton owned the property, plaintiff answered, "No;" that he thought Pendleton was agent, understood him to be agent for the property; was given to understand defendant was agent for the property and not the owner, and he (plaintiff) understood at the time defendant represented the owner.

Judgment affirmed. All concur.

JOEL EWING, etc., Appellant, v. E. E. PARRISH,  
Admr., etc., Respondent.

St. Louis Court of Appeals, May 17, 1910.

1. **EXECUTORS AND ADMINISTRATORS: Final Settlement: Final Discharge: Powers of Administrator.** An administrator's power ceases after final settlement, pursuant to due notice and approval thereof, accompanied by an order of discharge, so that he cannot thereafter sue as administrator on a demand due the estate, though if the final settlement was approved without an order of discharge, he is still under the control of the probate court, and may sue for the estate.
2. ———: ———: ———: ———: **Right to Sue for Newly Discovered Assets.** Though the judgment of the probate court, on the final settlement of an administrator, provided that the filing of receipts from the distributees should be in full discharge of all funds held by him, where no receipts were filed because the distributees contested the settlement, the administrator continued to be such, so as to authorize him to sue to recover assets of which he had no knowledge at the time of the settlement.
3. ———: **Assets of Estate: Failure to Inventory.** If notes belonged to an estate, their proceeds did not cease to be assets because they were not inventoried or accounted for in the administrator's final settlement, or because the probate court charged him with a note for which they were substituted.
4. **TRUSTS: Resulting Trust: Facts Stated do not Establish.** Plaintiff's intestate sold land, retaining a vendor's lien for the price, and the vendee afterwards borrowed a certain sum, giving a first deed of trust, and paid such amount to intestate, and executed notes secured by a second trust deed for the balance. The land was sold under the first trust deed for default. Plaintiff and the heirs decided not to purchase at the sale to protect the second trust deed, but defendant's intestate, the attorney for plaintiff as administrator, purchased the property at the foreclosure sale with his own money, without plaintiff's knowledge. *Held*, that defendant's intestate did not hold the land, or the proceeds of its resale, as a constructive trustee.
5. **ATTORNEY AND CLIENT: Attorney Purchasing Land Belonging to Client at Trustee's Sale: Trusts.** Where the administrator and heirs decided not to bid in land sold under a

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Ewing v. Parrish.

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first trust deed in order to protect a second trust deed held by the estate, an attorney for the administrator could buy the land for his own benefit.

6. **TRUSTS: Trust in Land: Oral Declaration: Statute of Frauds.** To declare an express trust in land on a verbal declaration would contravene the Statute of Frauds (section 3416, Revised Statutes 1899), making all declarations of trust of any land void, unless manifested and approved by writing and signed by declarant.
7. ———: **Trust in Personalty: Oral Declaration.** A trust in personalty may be established orally.
8. ———: **Action Against Trustee: Money Had and Received.** An action for money had and received will sometimes lie in favor of the *cestui que trust* against the trustee, but where the trust is disputed and the amount the trustee owes unsettled, the remedy is in equity.
9. **ATTORNEY AND CLIENT: Attorney Purchasing Land Belonging to Client at Trustee's Sale: Action for Profits: Suit in Equity Proper Remedy: Trusts.** Where the attorney for an administrator bought with his own money, without the administrator's knowledge, land sold upon foreclosure of a senior deed of trust, upon the decision of the administrator and heirs not to protect a junior lien held by the estate, an action by the administrator against the attorney for profits made in the transaction on the theory he bought as trustee for the estate could not be established by a demand presented in the probate court, a suit in equity being the proper remedy.

Appeal from Scotland Circuit Court.—*Hon Chas. D. Stewart, Judge.*

**AFFIRMED.**

*John M. Doran and Smoot & Smoot* for appellant.

(1) The appellant complains of the instructions generally and especially instructions Nos. 6 and 9. Instruction No. 6 tells the jury "unless you believe from the greater weight of the evidence in the cause that John B. Mudd at the time he took the Hunt note payable to himself, intended the proceeds arising therefrom to be applied to the benefit of the Pitkin estate, your verdict should be for the defendant." This instruction is clearly erroneous and misleading and not the law. It is not con-

fined to an expressed intention, but to any intention whether expressed or secret. *Harvesting Co. v. Chiswell*, 58 Mo. App. 471; *Coleman v. Roberts*, 1 Mo. 97; *Brewington v. Mesger*, 51 Mo. App. 348. (2) The partnership books of Smoot, Mudd & Wagner, which were admitted over the objections of the plaintiff, were clearly erroneous in this, that if they were entries in favor of the estate of Mudd they were entries in his own interest and were not admissible and this showing there being a transaction between the third parties and the mere declaration of the witnesses were inadmissible. *Hutchins v. Railroad*, 97 Mo. App. 348.

*E. R. McKec* and *J. M. Jayne* for respondent.

GOODE, J.—To render this case clear, a full statement of the facts is essential, and they were developed on the trial in a way that makes it difficult to ascertain from the record what they are. Much of the evidence put in consisted of testimony given on the trial of another case, wherein the final settlement of plaintiff as administrator was in contest, and many of the questions and answers on the present trial relate to what the witnesses testified at the other trial. Moreover, the testimony is, in many particulars, both vague and contradictory. This proceeding commenced in the probate court by plaintiff, as administrator *de bonis non* of the estate of H. G. Pitkin, presenting a demand against E. E. Parrish, as administrator of the estate of John B. Mudd, deceased, for the amount of three promissory notes signed by Barton Hunt, dated February 18, 1899, bearing seven per cent interest from date, one being for one hundred dollars and the other two for two hundred dollars each, less a credit on them of one hundred dollars. The total amount claimed, principal and interest, is \$558. Just when the demand was filed in the probate court is nowhere stated; but the date of the affidavit to the demand shows it was not prior to September

5, 1906. The notes had been executed by Hunt to John B. Mudd under circumstances which will appear as we proceed. Plaintiff's decedent, H. G. Pitkin, died in 1895, and the first letters on his estate were granted to his widow and son, but afterward plaintiff was appointed administrator *de bonis non*. In his lifetime, Pitkin had sold a tract of land containing one hundred and twenty acres to a man named Morrison and had given the latter a bond for a deed. Morrison owed the purchase money secured by a vendor's lien. After the death of Pitkin, Morrison sought to have the contract of sale specifically enforced, and the proceeding for that purpose was settled by an arrangement between him and plaintiff, as administrator, that Morrison should borrow \$750 on a first deed of trust on the land, pay the money to plaintiff as administrator, and execute to the plaintiff a promissory note for the balance of the price of the land, or \$520, and secure the note by a second deed of trust. This plan was carried out, as near as we can gather, around the year 1896 or 1897. Morrison borrowed \$750 from a man named Burkett and gave a deed of trust to N. V. Leslie to secure the loan. He turned the money over to plaintiff and executed a note to plaintiff for \$520, securing the same by a second deed of trust. The Burkett note was not paid and there was a sale of the land under the first deed of trust on account of the default. The right of the present case hinges largely on what transpired at that foreclosure sale. The question arose whether plaintiff ought to protect the second incumbrance by paying off the Burkett loan or bidding in the land at the sale by the trustee Leslie, or whether it was best to let the land go and lose the amount of the second incumbrance. Plaintiff took counsel with the Pitkin heirs about the matter, who preferred to lose the second deed of trust rather than put any money of the estate in the land or pay off the Burkett incumbrance. The entire evidence shows the decision reached by plaintiff and the heirs was to let the land go, they deeming

that course wiser than to attempt to protect the second incumbrance. As administrator, plaintiff had for his attorneys the firm of Smoot, Mudd & Wagner, and there is evidence tending to prove those attorneys resolved on a different policy, namely, to protect the Pitkin estate from the loss of the second note; but there is no evidence to show there was an understanding between them and plaintiff, as administrator, they should do so. On the contrary, the trend of all the testimony is to prove plaintiff knew nothing about their plan. Mudd bought the land in at the sale by Leslie, the trustee, for \$875, being the amount necessary to pay the debt, interest, costs and taxes, as Mudd testified in the other case. The evidence in the present record would support three theories of why Mudd bought the land: First, as said, that he bought it to protect the Pitkin estate; second, that he bought it to enable the Burkett estate to get the amount of its loan, because that loan had been made at the solicitation of Smoot, Mudd & Wagner, and Leslie insisted they were in honor bound to make the land yield enough to discharge it; third, that Mudd bought speculatively and for his own benefit. He testified in the contest over plaintiff's final settlement, he considered the land his own. The sale occurred November 21, 1898. Mudd wished to resell the land and on February 18, 1899, he sold it to Barton Hunt. The circumstances of that sale need to be stated. The firm of Smoot, Mudd & Wagner, the latter acting in the matter, arranged a loan from one Holley, for nine hundred dollars to be secured by a deed of trust. This money was to be turned over to Mudd, and Hunt was to execute to him three notes, one for one hundred dollars and two for two hundred dollars each, secured by a second deed of trust. After these notes had been signed by Hunt, Holley agreed to increase his loan to one thousand dollars, which was turned over to Mudd, who thereupon gave a credit of one hundred dollars on each of the notes Hunt had made



to him. The main question in the case, it will be perceived, is whether Mudd bought in the land at the sale by Leslie for the Pitkin estate, afterwards sold it to Hunt to reimburse himself what cash he was out, and took the Hunt notes, which represented the balance of the purchase price, for the benefit of the Pitkin estate. But other questions are involved. Plaintiff had submitted his final settlement as administrator to the probate court in 1899, a fact we ascertain from the opinion of the Kansas City Court of Appeals in *Ivy v. Ewing*, 120 Mo. App. 124, 96 S. W. 481. Though said final settlement is the fact principally relied on by the defendant to defeat plaintiff's demand, the date when it was filed is not shown. The probate court of Scotland county entered an order approving the final settlement and in it allowed plaintiff a credit for the Morrison note secured by the second deed of trust, which had been inventoried by him. The credit was allowed on the theory the note had been rendered worthless by the foreclosure of the Burkett deed of trust. The Pitkin heirs appealed from the judgment of the probate court approving the final settlement, to the circuit court of Scotland county, from whence the cause went on change of venue to the circuit court of Schuyler county. The exceptions of the heirs went not only to the credit to plaintiff of the amount of the Morrison note, but also to a credit of twenty-five hundred dollars allowed him on account of another matter with which we are not concerned. The circuit court of Schuyler county refused to allow plaintiff credit for the amount of the Morrison note and ordered him to be charged with it in his final settlement. This is said in defendant's brief to have been done because the circuit court deemed plaintiff had been remiss in not taking steps to save said item to the estate; but in point of fact the court gave no reason for its ruling, further than to say, that considering the value of the land on which the two incumbrances had been placed, plaintiff should be

charged with the item. The judgment of the Schuyler County Circuit Court was submitted to by plaintiff as regards said item, but the Pitkin heirs appealed to the Kansas City Court of Appeals as to the twenty-five hundred dollars credit which the Schuyler court allowed, following the ruling of the Scotland county probate court, and as to this credit the court of appeals reversed the judgment of the Schuyler County Circuit Court. What is material to the present controversy is, that the judgment of the circuit court of Schuyler county, charging plaintiff with the amount of the Morrison note, was certified to the probate court of Scotland county, which, at the September term, 1905, entered a judgment wherein it recited the presentation of the certified copy of the order of the circuit court of Schuyler county approving the final settlement of Ewing as administrator *de bonis non* of the Pitkin estate, and showing a balance due from said administrator amounting, principal and interest, to \$5,895.70. The probate court of Scotland county then proceeded in its judgment on the final settlement, to enumerate certain items of cost the Pitkin estate owed and which ought to be deducted from said sum before distribution, found \$5,162.57 was the net amount left to be distributed after the deduction, ordered distribution of said sum among the heirs, designating how much each should receive, and concluded by saying the administrator should take the receipts of the heirs for the respective shares "and file the same with this court, and when so filed to be in full discharge of all funds in the hands of said administrator." It was testified in the present case by J. D. Smoot, attorney for plaintiff, that though plaintiff was ready and willing to pay everything as administrator and had been ready to do everything required, "they (meaning, we understand, the heirs) do not seem to want it."

Going back now to the notes Hunt made to Mudd, it appears Hunt paid the amount of them to Mudd by check dated September 29, 1902, or three years before

the judgment of the probate court approving the final settlement of plaintiff, and more than four years before this demand was presented by plaintiff against the Mudd estate. The date of Mudd's death is not shown, but it was, of course, subsequent to the date when the notes were paid. Smoot testified Mudd said to him he (Mudd) had collected the Hunt notes and held the money for the Pitkin estate; but would retain it until after the contest over plaintiff's final settlement was decided in the Kansas City Court of Appeals; that there was no question the notes belonged to the estate and stood in lieu of the Morrison note; that in the last conversation between the witness and Mudd, the latter talked about having the money ready to turn over to Ewing. The evidence relied on to prove the notes belonged to the Pitkin estate was the testimony of Smoot and Wagner, the effect of which is that the land was bid in by Mudd to protect said estate and the notes to Hunt were afterwards taken in his name for the benefit of the estate. Some of the evidence tended to prove the sale of the land to Hunt after it had been bid in by Mudd, was negotiated by Wagner; whereas other testimony tended to prove Mudd made the sale to Hunt himself. The verdict having been for defendant on the appeal, plaintiff complains of instructions given to the jury; but the assignments of error will not be examined, for, in our opinion, the proceeding cannot be maintained, and if plaintiff is entitled to redress, he should seek it by another remedy.

A main contention for defendant is, plaintiff cannot maintain the proceeding because his final settlement as administrator of the Pitkin estate had been approved long before he filed the demand against the Mudd estate. Whatever the law is elsewhere, in this State a man's power as administrator ceases when he has submitted a final settlement to the probate court pursuant to due notice, and his settlement has been approved and he ordered discharged. Thereafter he can no longer act in

his representative capacity; hence cannot sue for a demand due the estate and not previously collected. [Goebel v. Foster, 8 Mo. App. 443; State v. Stephenson, 12 Mo. 162; Grayson v. Weddle, 63 Mo. 523; Melton v. Fitch, 125 Mo. 281, 28 S. W. 612.] But if a final settlement was filed and approved without being accompanied or followed by an order discharging the administrator, it has been held he is still under the control of the probate court and may represent the estate. [Rugle v. Webster, 55 Mo. App. 246; Garner v. Tucker, 61 Mo. 427; Rogers v. Johnson, 125 Mo. 202, 28 S. W. 635.] The extent of his power to act after approval of the final settlement, and subsequent to the term at which it was rendered, has not been ascertained definitely by decisions. It has been held he may execute a deed to lands previously sold and that if an administrator *de bonis non* is appointed, the presumption will be the estate had not been fully administered, and the appointment will be valid against collateral attack, and, perhaps, his competency to perform other duties has been adjudicated. [Cases cited last.] We perceive no reason why he may not collect newly discovered assets, and, if need be, sue to collect them. The judgment of the probate court in the final settlement of plaintiff contained no full order of discharge, though it declared the filing of the receipts from the distributees should be in full discharge of all funds in plaintiff's hands. There is no proof these receipts were ever filed so as to work a discharge even to that extent. On the contrary, the testimony of Smoot tends to prove plaintiff had been unable to settle with the distributees who were contesting his settlement in some manner. These being the facts, it appears plaintiff had not ceased to be administrator and, therefore, might recover assets not included in his previous settlement and of the existence of which he was unaware when he settled. [Woerner's Admr. Law., secs. 506 and 570 to 572 inc.] It might be argued that as plaintiff was charged with the amount of the Morrison

note in the final settlement, which became a final judgment when approved, and as the theory of the present proceeding is that the Hunt notes took the place of the Morrison note, the Pitkin estate has no interest in the collection of the Hunt notes by plaintiff, as the amount of them would go only to reimburse him for the debt of the Morrison note. If the Hunt notes ever belonged to the Pitkin estate, their proceeds are none the less assets of it because they were not inventoried by plaintiff or taken account of in his settlement. Neither are they any the less assets because the probate court, in ignorance of the facts, held plaintiff liable for the Morrison note for which, in a sense, they were substituted.

The fault of this proceeding lies deeper. Plaintiff is seeking to collect in the ordinary way a money demand from the Mudd estate as a debtor of the Pitkin estate. But if anything is due the latter estate from the Mudd estate, the liability, in our opinion, did not arise in such a way as to make it recoverable in this kind of proceeding. It could only have arisen from Mudd being trustee for plaintiff as administrator, first of the land he bought in at the foreclosure sale under the Burkett deed of trust, and secondly of the notes he took from Hunt when the land was sold to the latter. In other words, to lay the Mudd estate liable for the proceeds of those notes, a trust must be established wherein Mudd was the trustee for plaintiff as administrator. Moreover, this trust would necessarily be an express and not a resulting or constructive trust. Plaintiff advanced no money to buy in the land at the sale under the Burkett deed of trust when Mudd acquired the title. Hence a resulting trust did not arise on that ground, and the facts on which other classes of resulting trusts may be raised are so unlike those of the case at bar that it is useless to elucidate further why there was no such trust. See 15 Ency. Law (2 Ed.), pp. 1124 *et seq.* We find no facts upon which Mudd could be held trustee of a constructive trust for the benefit of plaintiff as admin-

istrator. As stated, plaintiff and the Pitkin heirs had resolved to make no effort to bid in the land or to protect the second incumbrance, but to let the land go to whomsoever bought at the sale under the Burkett deed of trust. Therefore Mudd, though he was plaintiff's attorney, was free to buy at said sale for his own benefit; and if he took the land as trustee, or afterwards held the Hunt notes as trustee, it was by virtue of an arrangement by the members of the firm of Smoot, Mudd & Wagner, made of their own motion, to protect plaintiff as administrator by buying the land for his benefit, and thereby prevent him from losing the amount of the Morrison notes. To enforce liability on this theory, by holding Mudd took the land as trustee and as such must account for the proceeds of it left after he was reimbursed, it is necessary to raise an express trust in land upon a verbal declaration or agreement, thereby contravening the Statute of Frauds. [R. S. 1899, sec. 3416; Woodford v. Stevens, 51 Mo. 443; Mansur v. Willard, 57 Mo. 347.] But Smoot testified Mudd declared to him after the land had been resold to Hunt, that he (Mudd) held the Hunt notes, and when they had been paid, declared again he held their proceeds for the benefit of plaintiff as administrator. A trust in personal property may be established orally. [Harris Banking Co. v. Miller, 190 Mo. 640, 89 S. W. 629.] We decline to decide further on the evidence before us that Mudd should be held a trustee of an express trust in respect of the Hunt notes, and decide only that the question cannot be determined in this proceeding. An action for money had and received will sometimes lie in favor of a *cestui que trust* against the trustee. [Johnson v. Smith's Admr., 27 Mo. 591; Clifford Banking Co. v. Comm. Co., 195 Mo. 262, 94 S. W. 527; Ziederman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.] Nevertheless, where the trust is disputed and the amount the trustee owes unsettled, thereby putting in issue other questions than the right of the *cestui que trust* to an ascertained balance

from the trustee—where, in short, the trust itself must be established—the remedy ought to be in equity. See for full examination of the subject, *Johnson v. Johnson*, 120 Mass. 465. Even in instances when, the trust being admitted, an action for money had and received is tolerated, this is done because the action is regarded as equitable in its nature. It is clear to our minds that a mere formal demand presented in the probate court is not the kind of proceeding in which the present controversy, considering the scope of it, can be properly investigated. [*Nester v. Ross, Est.*, 98 Mich. 200.] The cited case was a demand preferred in a court of probate for damages for breach of a contract wherein the decedent had agreed to sell timber lands, or to manufacture the timber on the lands, and from the proceeds pay certain debts of the plaintiff Nester; and after said debts were paid and expenses, the remainder of the lands and timber were to be divided in common by the parties. It was held the contract was not only security for the debts to be paid out of the proceeds of the lands and timber, but that it also created a trust in favor of the claimant Nester and the only forum competent to settle the rights of the parties was a court of equity. While the facts of that case are not identical with those at bar, they are sufficiently analogous for the opinion to shed light on the question of law we are to decide and point to the correct decision. Quite in point is *Norton v. Ray, Excx.*, 129 Mass. 230, where it appeared the defendant's testator, Isaac C. Ray, bought at a sale a dwelling house for the plaintiff at the latter's request and with his money, and had taken a deed in the name of himself, Isaac C. Ray, but had afterward signed a paper acknowledging the purchase was for Norton's benefit, and that the premises were held for and would be conveyed to the latter upon request. Ray conveyed to Norton's wife, who lived apart from Norton, and the action was against Ray's estate for the value of the premises. There, though the trust was not disputed, it

was held the only remedy was in equity; that an action for money had and received would not lie; citing Johnson v. Johnson, 120 Mass. 465. In point, too, is Davis' Admr. v. Coburn, 128 Mass. 377, where the plaintiff's decedent had sent nine hundred dollars to the defendant to keep and invest for the decedent, and that the defendant received the money and kept it in his own name, but mingled it with his own money. It appeared no account had been rendered of the trust and no settlement of the amount due under it had been made. The court said that under those circumstances the remedy was by bill in equity, as an action at law will not lie in favor of a *cestui que trust* against the trustee while the trust remained open.

The judgment is affirmed. All concur.

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CHARLES T. OVERHULSER, Respondent, v. EDWARD W. PEACOCK, Appellant.

St. Louis Court of Appeals, May 17, 1910.

1. **SALES: Fraud and Deceit: Rescission of Contract: Silence as to Defects.** For silence in respect to a defect in an article sold to be ground for rescission by the buyer, when he buys on his own judgment and no warranty is given, the silence must be attended by circumstances rendering it a fraud; there must be some agreement or relationship that makes it the duty of the seller to divulge the defect.

———: ———: ———: ———: **Facts Stated.** Where a seller stated that if the horse were sound the price would be \$200, and accepted a much lower price, and told the buyer the horse had had the distemper which had left his wind a little heavy, and the buyer saw the horse and thoroughly inspected him and brought on his own judgment after the seller had made said statements, which should have induced the most cautious examination, the mere silence of the seller in not stating that the horse had the heaves would not *ipso facto* be a fraud, and the question where the seller was guilty of fraudulent concealment was one for the jury, there being ample evidence that no fraud was intended or practiced.



## Overhulser v. Peacock.

3. ——— Implied Warranty. The doctrine of warranty of fitness has no application in such a case; but at any rate there was no such warranty against defects discoverable by an inspection of ordinary care.

Appeal from Clark Circuit Court.—*Hon. Chas. D. Stewart*, Judge.

**AFFIRMED.**

*Whiteside & Rutherford* and *Walker & McBeth* for appellant.

(1) Any contract, the making of which is induced by the fraud of either party, practiced upon the other at the time the contract was made, or while negotiations in regard to it are being carried on, is voidable, and may be rescinded at the election of the party defrauded. *Smith v. Richards* (U. S.), 13 Pet. 26, 10 Law Ed. 42; *Skinner v. Brigham*, 126 Mass. 132; *Reed v. Patterson*, 91 Ill. 288; *Bean v. Hartrick*, 12 Me. 262; *Camp v. Camp*, 2 Ala. 632; *Miner v. Medbury*, 6 Wis. 295; *Bustered v. Farrington* (Minn.), 31 N. W. R. 360; *Ormsby v. Budd*, 72 Iowa 80; *Hickey v. Drake*, 47 Mo. 369.

(2) The fraud may consist either in fraudulent representations or in fraudulent concealment in respect to the subject-matter of the contract. That is, actual fraud consists in a statement of what is false, or the concealment of what is true. 8 Am. and Eng. Ency. of Law (1 Ed.), p. 635; *Story's Equity Jurisprudence* (3 Ed.), sec. 186; *Kerr on Fraud and Mistake*, 42; *Smith on the Law of Frauds*, sec. 1, p. 3, clause "e" and "f."

(3) Misrepresentation may consist as well in concealment of what is true as in the assertion of what is false. If a seller conceals a fact that is material to a transaction, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if the existence of such fact were expressly denied. *Smith on the Law of Frauds*, sec. 8; *Bank v. Mentzer*, 125 Iowa 101. (4) It is a fraud for a man to tell part

of the truth in regard to what he is inquired of and keep back another part which he knows, if disclosed, would prevent the other party from dealing with him, and tell him something else to draw off his attention and prevent further inquiry. Smith on the Law of Frauds, sec. 8, p. 10; Croyle v. Moses, 90 Pa. St. 250; Chamberlain v. Fuller, 59 Vt. 247. (5) Where the seller suppresses a material fact within his knowledge which honesty and good faith required him to disclose, his conduct amounts to a fraud which will be sufficient to authorize the rescission of the contract. Griel v. Lomax, 89 Ala. 420; Stewart v. Cattle Co. (U. S.), 32 Law Ed. 439; Devoe v. Brandt, 53 N. Y. 462.

*W. L. Berkheimer* for respondent.

(1) There were no representations of soundness of the horse, as shown by the evidence. Consequently we say in this case under all the evidence, that the verdict found by the jury, that the rule *caveat emptor*, applies with full force. Moore v. Koger, 113 Mo. App. 428; Anthony v. Potts, 63 Mo. App. 517; June Company v. J. V. Falkenburg, 89 Mo. App. 563; Thompson v. Botts, 8 Mo. 710. (2) There must be a warranty or fraud to make the vendor of a horse, with a secret malady, responsible to the purchaser. The purchaser takes the risk of quality and condition, unless he protects himself from a warranty; or there must be fraud on the part of the vendor. Lundsey v. Davis, 30 Mo. 406. (3) The maxim of the civil law does not prevail, is not recognized in our law, that a sound price implies a sound commodity, for the reason that it is considered as being too restrictive of the right of every man to make the best bargain possible. Lindsey v. Davis, 30 Mo. 409. Recognized in the cases cited in Moore v. Koger, 113 Mo. App. 428.

GOODE, J.—Plaintiff sold and delivered to defendant a bay horse, May 18, 1909, defendant giving a check for \$162.50 for the price, but stopping payment of the check, an act which resulted in the present case, brought to recover the price of the horse. The defense is the animal had an incurable disease called heaves, which fact was known to plaintiff at the time of the sale, but was unknown to defendant and was latent so as to be undiscoverable in the opportunity defendant had to examine the horse. As presented on the appeal this defense takes on a two-fold character, to-wit, as cause for rescission of the contract of sale by defendant on the ground of fraudulent concealment of the disease by plaintiff, and, second, as an implied warranty the horse was fitted for defendant's purpose, which was to sell; in other words, was merchantable, when, in point of fact, it was not. The answer says the horse was diseased, unsound and worthless, as plaintiff knew at the time of the sale, though defendant believed it to be sound and free from disease and, before buying, carefully examined and tested it in reference to its soundness, but failed to discover the disease; that plaintiff, knowing defendant was under the impression the horse was sound, and knowing, too, defendant was buying to sell on the market, did not at any time before the sale tell defendant the horse had the disease known as heaves, but fraudulently and deceitfully concealed from defendant said unsoundness; defendant discovered the horse had the heaves a day or two after the purchase and then offered to rescind the sale and return the animal; that plaintiff refused to rescind; wherefore it is averred defendant is not indebted to plaintiff in any sum. Defendant is and all his life has been a dealer in horses; buying, shipping and selling them. His home is in Iowa, but he is in the habit of buying in Missouri, and in Clark county. William Tucker is a livery man in Kahoka, in said county, and he, too, had handled horses all his life; buying, selling, and inspecting them.

His barn in Kahoka was a headquarters for horse dealers and it was defendant's habit when in Clark county to make use of the barn and to rely considerably on Tucker's judgment in buying. Plaintiff is a mail carrier, whose route is in the county and some twenty-three miles long. He owned two horses, a gray and a bay, which he had long used in carrying mail over the route. The record suggests plaintiff resided in the village of Ashton, where Tucker and Peacock called on him with the view of buying his horses; or rather, they were under the impression plaintiff's father owned the gray horse and asked plaintiff to ascertain if the horse could be bought from his father. Thereupon plaintiff notified them he owned the horse and would sell it. They bargained awhile about the gray horse and finally bought it, but during the negotiation they asked plaintiff if he would sell the bay horse. He replied in language testified by defendant: "Yes, I will sell him to you; but I don't think you would buy him; he has had the distemper and it left his wind a little heavy, but he is getting better." Tucker and defendant said they would be back in the afternoon to look at the horse and went at two o'clock. Plaintiff drove up with the bay horse hitched to a cart, showed them first the gray horse, then Tucker asked him to bring the bay out. They trotted the latter around a good deal, put a bridle on him and had him run about two hundred yards and back, and Peacock said he did not see anything wrong with his wind; that he seemed to be sound; discovered no indication he had heaves. Defendant put him in Tucker's barn that night and in a day or so after the horse had been fed hay and bran, found he had the heaves and demanded plaintiff take him back. Such was defendant's version of the sale. Tucker's was about the same. He testified he and defendant ran the horse around the lot, asked plaintiff if his wind was all right; plaintiff said he had had the distemper, but defendant could wind him, and thereupon they ran him; did not

see any indication of heaves. The witness testified that putting a horse to feed on grass will reduce the heaving; but if he had only been on grass one day, that would not suffice to stop the disease and the horse "would have to be fixed some other way." Tucker testified also he had known the horse for a good while and had tried to buy him. Peacock testified plaintiff told him the horse had been on pasture, but did not say how long; did not say he had been out only one night. A veterinary surgeon put on the stand by defendant, testified heaves was an incurable disease and injured a horse very much; had the same effect on a horse as asthma had on a man; was not hard to detect unless the horse had been doctored; that the disease was occasionally caused by distemper; putting a horse on grass would lessen the symptoms; that if the horse had been on pasture and was then bridled and run a couple of hundred yards and did not show any puffing of the flanks, distention of the nostrils or labored breathing, witness "would think the horse had been fixed—prepared for examination—meaning the heaves had been shut down so the symptoms would not show." Plaintiff testified that after he had priced the gray horse to defendant and Tucker, they asked about the bay horse. Plaintiff told them the bay was not fit to sell or show; that defendant could not buy him, for he was not fit to sell. Tucker asked what the price would be if he was all right. Plaintiff said if he was all right the price would be \$200; but defendant could not buy him; had previously told Tucker the horse was not for sale; had turned the horse on the grass the night before. Tucker insisted witness bring the horse out and show him, but plaintiff said "there is no use, you wouldn't buy him; I know you can't buy him." Tucker and defendant still insisted on seeing him and plaintiff then brought him out. They offered \$150 and plaintiff asked \$175. They said that was too much, considering the condition he was in—too much money for a heavy horse—plaintiff told them he had the distemper and it had

affected his wind; they ran him about the barn lot a couple of hundred yards or so and back, then looked him over again. Plaintiff could see he was thumping in the flanks, his nostrils were distended; could observe it at the time and it was caused by the distemper; the thumping and distention could easily be discovered when he was sold; afterwards when defendant wanted to rescind the sale, he admitted plaintiff had not misrepresented the horse. Some other testimony was given, conducing to prove plaintiff knew the horse had heaves at the time of the sale.

Complaint is made of the instructions to the jury. The general theory of law on which the case was put to the jury was that it was the duty of the defendant to use ordinary care to discover any defect in the horse; that if he inspected the animal but failed to use ordinary care, and by inspecting carefully would have discovered he was afflicted with heaves, then the defendant could not escape liability for the price, even though plaintiff knew at the time the horse had the disease; or unless defendant had agreed to pay substantially a sound price for the animal; further instructed that though fraud was not presumed, it need not be proved by positive testimony, but might be inferred from all the facts and circumstances in evidence. An instruction requested by defendant and given by the court with a modification which in no way changed its meaning, will perhaps exhibit the way the defense was presented. The jury were told, in effect, that if they believed from the greater weight of the evidence plaintiff knew at the time of the sale the horse had the heaves, and defendant used such care in inspecting as is used by persons buying and selling horses, the time and circumstances considered, and was unable to discover he had the heaves, and plaintiff knew defendant was ignorant of that fact, and knew defendant was buying to sell on the market and \$162.50 was a fair market value of the animal, then it was the duty of plaintiff to inform defendant the horse had the

disease, if in fact he had, and unless plaintiff so informed defendant, the verdict should be for the latter.

We perceive no merit in this appeal. Aside from the instructions which were fair and sound, the verdict appears to have been for the right party. According to defendant's own testimony, plaintiff told him when he wished to examine the horse, the animal had had the distemper and it had left his wind a little *heavy*. We supposed the italicized word was used to state the fact that the horse's breathing was not so light as it should be, or was labored, instead of to express the idea that the distemper had brought on heaves. In the abstract of the record when said word is employed to state the horse was afflicted with the disease of heaves, it is spelled *heavy*. But on looking into the transcript we find that spelling nowhere used; instead, in every instance where a witness described a horse with the heaves by using the adjective of the word, the spelling is *heavy* and the horse, or his breathing, is said to be "heavy." We do not find the word "heavy" in the dictionaries; but do find the word "heavy" with this definition, among others: "having the heaves; as a heavy horse." Standard Dictionary, and in Webster's New International: "Heavy; having the heaves." The veterinary surgeon testified heaves might be caused by distemper and it is conceded plaintiff notified defendant the horse had had the distemper and the disease had left his wind heavy. Our impression from the record is that plaintiff gave specific information that the horse's breathing was heavy in the sense that the distemper had left him with the heaves; but it might be he meant his breathing was labored without meaning he had said disease, and defendant so understood—an improbable theory. In instructing the jury the court did not proceed upon the hypothesis that plaintiff told defendant the animal was afflicted with the heaves, nor even submit the issue of whether plaintiff told him, as might properly have been done, at least. The hypothesis of the instructions

rather was that plaintiff had not told this fact, and the jury were instructed to find whether plaintiff was aware of it and fraudulently concealed it from the defendant. The main point urged here is that if plaintiff knew the horse had heaves, he was bound, in every event, to notify defendant of the fact; was, *ipso facto*, guilty of a fraud if he did not, regardless of whether the disease was detectible by an ordinary inspection, or of the price defendant was to pay. In our opinion this proposition is not the law, and, moreover, is inconsistent with instructions asked by defendant. Defendant insisted on seeing the horse against plaintiff's wish, and bought on his (defendant's) own judgment, and that of the expert he had with him after full inspection and, according to his own version of what occurred, after statements by plaintiff about the condition of the horse which, on any view of what was said, should have induced the most cautious examination. Moreover, defendant was told if the horse was sound, plaintiff's price would be two hundred dollars, and a much lower price was paid. For silence in respect of a defect in an article to afford ground for rescission by the buyer, when he buys on his own judgment and no warranty is given, the silence must be attended by circumstances which render it a fraud—there must be some agreement or relationship that makes it the duty of the seller to divulge the defect. [Benjamin, Sales (4 Ed.), p. 448.] At most the issue of fraudulent concealment by plaintiff was for the jury, as there was ample evidence that no fraud was intended or practiced.

It is contended plaintiff impliedly warranted the fitness of the horse for the market. We incline to think the doctrine of warranty of fitness has no application to the case; but at any rate, there was no such warranty against defects discoverable by an inspection of ordinary care, and the instructions held plaintiff responsible if the disease could not have been discovered by using that



degree of care in making the examination. [Lindsay v. Davis, 30 Mo. 406; Moore v. Koger, 113 Mo. App. 423, 87 S. W. 602; Colchord v. Foundry Co., 131 Mo. App. 540; Grojean v. Darby, 135 Mo. App. 586, 116 S. W. 1062.]

The judgment is affirmed. All concur.

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**ADAM ROTH GROCERY COMPANY, Appellant, v.  
HOTEL MONTICELLO COMPANY et al., Re-  
spondents.**

St. Louis Court of Appeals, May 17, 1910.

1. **CORPORATIONS: Misappropriation of Assets: Action by Creditor: Parties: Misjoinder.** In a suit by a creditor of a corporation against its officers for misappropriation of assets, the trustee in a deed of trust executed by the corporation for the benefit of all its creditors is a proper party only in case he confederated with the officers in the misappropriation and the deed of trust was executed to further the scheme, which he acceded to with knowledge of the fraudulent purpose.
2. ———: **Insolvency: Transfer of Assets to Trustee.** A failing corporation may transfer in good faith its assets to a trustee for the benefit of all its creditors, and may confer on the trustee the power to collect its assets and distribute the proceeds pro rata among the creditors, instead of resorting to a general assignment.
3. ———: ———: ———: **Setting Aside.** Whether administration of the estate of an insolvent corporation by an assignee or trustee appointed by the corporation will be interfered with by the courts depends on the facts and chiefly on the presence of good or bad faith.
4. ———: ———: ———: ———: **Necessary Parties.** In a suit by a creditor of a failing corporation to set aside a deed of trust executed by the corporation for the benefit of all its creditors, the creditors named in the deed of trust, or at least enough of them fairly to represent the others, are necessary parties.
5. ———: ———: ———: ———: **Presumption Trustee Will Perform Duty: Evidence.** In a suit by a creditor of a failing corporation to set aside a deed of trust executed by the corpora-

tion for the benefit of all its creditors, in the absence of proof to the contrary, it will be presumed the trustee will sue on demands owing the corporation, if he should.

6. ———: ———: ———: ———: Evidence Held Insufficient to Warrant Removal of Trustees. In a suit by a creditor of a corporation to set aside a deed of trust executed by a corporation for the benefit of all its creditors and to appoint a receiver for the corporation, it is *held*, under the evidence, there was no ground for removing the trustee or for appointing a receiver.
7. ———: Misappropriation of Assets: Conversion by Officers: Evidence Held Insufficient. In a suit by a creditor of a corporation against its officers for misappropriation of its assets based on their converting to their own use a specified sum of the assets, evidence *held* insufficient to show conversion.
8. ———: Purchase of Assets at Public Sale by Officer. Whether the purchase of property of a corporation at public venue to the highest bidder, at a mortgage sale, by an officer of the corporation, for his own use and benefit, where the corporation had ceased to be a going concern and its officers were no longer managing its business affairs, is unlawful, *quære*.
9. ———: Retirement of Shares: Validity. A corporation has no right to pay the holders of shares of its capital stock their face value out of the company's money until the capital stock has been reduced.
10. ———: ———: Misappropriation: Evidence Held Insufficient. In a suit by a creditor of a corporation against its officers for misappropriation of its assets in retiring preferred shares of stock, evidence *held* insufficient to show misappropriation in the retirement of the preferred shares.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. H. Williams*, Judge.

AFFIRMED.

*McShane & Goodwin* and *Geo. J. Bramsch* for respondents.

(1) A court of equity in this case has the power and jurisdiction to take charge of the assets of an insolvent corporation and distribute them ratably amongst its creditors upon a showing that the officers and agents of such a corporation, in charge of its assets, are wasting

and dissipating the same, and even though this is in the nature of a creditor's bill, yet such relief will be granted at the instance of a general creditor without him first having reduced his claim to a judgment and exhausted his remedy at law. *White v. Land Co.*, 49 Mo. App. 450; *Burnham, Munger & Co. v. Wm. F. Smith*, 82 Mo. App. 35; *Woolen Mills Co. v. Kampe*, 38 Mo. App. 229; *Bank v. Chattanooga*, 53 Fed. 314; *Doe v. Coal & Transportation Co.*, 64 Fed. 928; *Tompkins v. Catawba Mills*, 82 Fed. 780. (2) Funds of corporation cannot be used to purchase its own stock, thereby distributing its assets amongst its members and advancing its insolvency and dissolution. 10 Cyc., p. 168, sec. 22, p. 796, sec. 12. (3) An officer or director of a corporation cannot deal in his own behalf in respect to corporate property, or in respect to any matter involving the exercise of his duties as such officer or director. *McAllen v. Woodcock*, 60 Mo. 174; 10 Cyc., p. 799, sec. 16. (4) A mortgage to be effectual as to third parties must point out the property and describe it, so that third parties by its aid, and such aid as an examination would suggest, may identify the particular property conveyed. *Bank v. Commission Co.*, 93 Mo. App. 123; *Holmes v. Commission Co.*, 81 Mo. App. 97; *Bank v. Schakelford*, 67 Mo. App. 475; *Vette v. Leonori*, 42 Mo. App. 217. (5) An assignee of an insolvent corporation for the benefit of creditors cannot pursue assets fraudulently disposed of. *Heinreichs v. Woods*, 7 Mo. App. 236; *Roan v. Winn*, 93 Mo. 503; *Harris v. Harris*, 25 Mo. App. 496. (6) An assignee for the benefit of creditors has the right to pursue stockholders for unpaid stock subscriptions, but in so doing he must proceed in a court of equity. *Lionberger v. Bank*, 10 Mo. App. 499. (7) It being admitted that defendant corporation is insolvent; that it is a non-going concern and not in the exercise and use of its property and business; and it being further admitted that defendant corporation has,

by its own act, put itself out of the use and possession of its own property and committed itself to liquidation, it follows as a matter of course that if full and exact justice is to be done and the rights of the creditors are to be preserved, that the court should take charge of the assets of such defunct corporation and distribute them ratably amongst its creditors and to accomplish this purpose the court is authorized to appoint a receiver. *Buck v. Insurance Co.*, 4 Fed. 849.

*Jamison & Thomas* for respondent, J. William Taylor.

(1) One whose interest in the matter in controversy is only that of a trustee must be sued as such, and not as an individual. R. S. 1899, sec. 545. (2) The mere execution of a chattel deed of trust by a corporation does not constitute grounds for the appointment of a receiver. *Pullis v. Pullis*, 157 Mo. 565; *Jaffrey v. Mathews*, 120 Mo. 317. (3) In the absence of any proof of fraud a chattel mortgage or deed of trust is valid as against all parties, if possession of the property mortgaged is delivered to the mortgagee. *Weber v. Armstrong*, 70 Mo. 217; *Albert v. Van Frank*, 87 Mo. App. 511; *State ex rel. v. Cooper*, 79 Mo. 464. (4) An insolvent debtor can mortgage or pledge all or any part of its property for the benefit of one or all of its creditors. *Jaffrey v. Mathews*, 120 Mo. 317; *Bank v. Bank*, 130 U. S. 223; *Crow v. Beardsley*, 68 Mo. 435; *Hargadine v. Henderson*, 97 Mo. 375.

*John H. Boogher* for respondent, Hotel Monticello Company; *Dawson & Garvin* for respondent, E. S. Boogher.

The Hotel Monticello Company was incorporated November 22, 1901, with a capital stock of \$30,000 owned by three shareholders, as follows: One share

each by Charles M. Hill and Louis C. Irvine, and 298 shares by Charles W. McFarland, the shares being \$100 par value. On October 22, 1902, or eleven months later, the capital stock was increased to \$150,000, of which \$100,000 worth was common stock and \$50,000 preferred. The certificate of increase showed the stockholders had provided privileges for the preferred shares; they should be cumulative, dividend bearing shares and draw a dividend of eight per cent per annum, payable quarterly, out of the net yearly income earned in any year and before a dividend was paid on the general stock; the holders of preferred shares, in case of dissolution or liquidation of the company should have priority of payment over the holders of common stock, out of the assets after the payment of debts; a fund should be accumulated to retire the preferred stock after three years upon the payment of its par value to stockholders, together with an added amount of ten per cent of the par value. The certificate for the increase of the capital stock showed the assets of the company were \$45,000, its liabilities \$7000 and that of the \$150,000 capital stock, \$70,000, or seven-twelfths of the whole amount of the increase, had been paid up in lawful money of the United States and was in the hands of the board of directors. We understand the statement of the assets at \$45,000 meant assets held prior to the payment of the \$70,000 in cash upon the increase of the capital stock. A lease executed by Hattye Lederer, Edmund P. Nelson and Thomas H. Wagner as lessors and the Hotel Monticello Company as lessee, was executed November 27, 1905, by which the lessors let to the Monticello Company, for a term of twenty years from the date of the lease, a lot of ground fronting ninety-five feet on the east line of Kingshighway and having a depth eastwardly of one hundred and eighty-five feet on West Pine Boulevard in the city of St. Louis, and all improvements standing on the lot. The consideration for the lease was an agreement by the Monticello Company

to pay \$246,000 as rental during the twenty-years' term at the rate of \$1000 a month for the first ten years and \$1050 a month for the second ten years, to pay all general and special taxes against the property, maintain the premises in repair, and to do other acts we need not state. The instrument of lease declared a violation of its covenants should work a forfeiture and end the term with all the rights and responsibilities accruing thereunder, if the innocent party elected to declare a forfeiture in writing; further provided the Monticello Company, as lessee, should execute and deliver to the lessors, forty days after the execution of the lease, a chattel mortgage on the furniture, fixtures and personal property kept and used by said lessee on the premises as security for payment of rent, taxes and other charges the lessee bound itself to pay. Pursuant to that term of the lease a chattel mortgage was executed December 30, 1905, covering the furniture, fixtures and personal property of every kind on the premises and in the building and was made to embrace other similar personal property, furniture or fixtures thereafter acquired by the Monticello Company and placed in the buildings and premises. A second chattel mortgage was executed by the Monticello Company on May 15, 1906, to E. P. Nelson on the property described in the first mortgage to secure thirty-five notes of \$350 each, falling due at various dates from June, 1906, to May, 1909, and drawing interest at six per cent per annum. Each mortgage empowered the mortgagee to take possession of the property conveyed, upon the mortgagor's default, and to advertise the property for sale and sell it at public auction to the highest bidder for cash, after giving the prescribed notice. Transactions occurred later looking to the retirement of shares of preferred stock in the Monticello Company by the holders of shares of the common stock, pursuant to terms provided by the shareholders and recited in the certificate for the increase of the capital stock. On October 21, 1902, the Monticello Com-

pany entered into an agreement with the Germania Trust Company of the city of St. Louis, which recited, the holders of the common stock of the company had the option to retire the preferred stock in 1902 at \$110 a share; the holders of both kinds of stock had agreed to deposit with the Trust Company \$1000 payable quarterly, until the preferred stock had been retired in full as aforesaid; the Monticello Company was to designate in writing to the Trust Company when any preferred stock was to be retired, and the amount to be retired, and was to have the certificates of those shares delivered to the Trust Company for cancellation, and said Trust Company was to hold the cancelled certificates as its receipt for money paid by it out of whatever funds it might receive from the Monticello Company as a sinking fund for the retirement of preferred stock; the Trust Company agreed to receive and hold on deposit all sums offered by the Monticello Company to retire preferred shares. At a directors' meeting on December 5, 1903, a resolution was passed regarding the contract between the Monticello Company and the Germania Trust Company. The purport of the resolution and its recitals was that after the termination of the World's Fair in St. Louis, the Monticello Company might find itself embarrassed for money wherewith to meet the sinking fund it was to create with the Trust Company for the retirement of preferred shares, but the earnings expected during the World's Fair period would enable the Monticello Company easily to retire the preferred stock, thus reduce the burden on the corporate assets and save the eight per cent dividend payable annually on preferred stock; that the present owners of preferred stock were willing the contract between the Monticello Company and the Trust Company should be altered and the president of the Monticello Company was authorized to enter into a contract in lieu of the previous one, by means of which the preferred stock with its accrued dividends should be retired if possible out of the net earnings

of the corporation during the year 1904. A supplemental agreement was made between the Monticello Company and the Trust Company on January 15, 1904, pursuant to a resolution of the board of directors of the Monticello Company passed December 5, 1903. The substantial terms of the supplemental agreement and its recitals were these: The Monticello Company had procured from the holders of the five hundred shares of preferred stock their certificates of shares and had caused the same to be deposited with the Trust Company subject to the terms of the supplemental agreement of January 15, 1904; the Monticello Company should deposit with the Trust Company from time to time, for the purpose of creating a sinking fund, all the net earnings of the Monticello Company from June to November, 1904, inclusive, provided that if said deposit did not amount to \$60,000 by December 1, 1904, the Monticello Company should continue to deposit the net earnings for two years more or until \$60,000 had been accumulated with the Trust Company; the Trust Company should hold said deposit until \$60,000 had been accumulated and then should apply the money to pay the preferred shares at the rate of \$110 par value, plus accumulated dividends; provided the Hotel Company should, after the deposit amounted to \$60,000, provide for the reduction and decrease of its capital stock to the amount of \$50,000, in the manner required by law; provided, further, if the deposit did not reach \$60,000 within two years after December, 1904, the capital stock should be reduced to an amount five-sixths as large as the amount of the deposit or as near said ratio as might be, and the preferred shares should be paid by the Trust Company, to the amount of the deposit had on hand, at the rate of \$110 par value; or if the capital stock should be reduced in a sum less than \$50,000, the Trust Company should pay from said trust fund the preferred shares to an amount equal to the amount of the reduction of the capital stock, but not to exceed five-sixths of the



amount of the deposit with the Trust Company. It was further stated the Monticello Company might, at any time during the period provided for the accumulation of the fund to retire the preferred shares, arrange for a reduction of its capital stock by a vote of its stockholders to any sum equal to five-sixths of the deposit on hand with the Trust Company, and then have the said deposit applied at any time to pay the preferred shares in order that the Monticello Company might escape the payment of dividends; that when preferred shares were paid, they should be retired and paid by the Trust Company. So much has been said regarding the preferred shares of the Monticello Company, because the chief matter of complaint in the brief for appellant relates to those shares. It appears further that on January 14, 1907, the Monticello Company served a written notice on the Germania Trust Company, saying as follows: During the World's Fair year, 1904, the Monticello Company had earned approximately \$35,000 which was intended to be applied by the Trust Company under existing contracts for the retirement of the shares of outstanding preferred stock; the terms and conditions of those agreements had been satisfied, evidence of which had been given by the receipt of John H. Boogher, the owner and holder of the beneficial certificates mentioned in the agreement; said holder of preferred stock was willing to acknowledge payment thereof to the Trust Company and relieve the Monticello Company from further liability; the company, meaning the Monticello Company, having satisfied the grantee thereof, gave notice to the Trust Company that after January 14, 1907, the total outstanding liability was \$15,000 which was to bear interest from January 1, 1907, payable semi-annually, January first and June first of each year; that thereafter no preferred shares would be issued in excess of the above mentioned sum, namely, \$15,000 or 150 shares of the par value of \$100 each. During the month of January, 1907, the respond-

ent Mrs. Elizabeth S. Boogher, at that time Mrs. White, acquired an interest in the Monticello Company by purchasing \$15,000 of the par value of the preferred stock. Her testimony suggests the company was then badly in arrears and being pressed for payment of its obligations, but just how much it owed is not shown. Mrs. White later married Mr. John H. Boogher, who had been an officer of the Monticello Company for years. He remained vice-president and secretary after the purchase, she became president and general manager and, in fact, operated the hotel until February 19, 1908, and her son Frank M. White acquired one share and became a director. She, too, was a director and so was John H. Boogher. Frank White acquired his share of stock January 14, 1907, and according to his answer was elected a director that day. Mrs. Boogher states in her answer she acquired her stock in January, 1907, not stating the day. Mrs. Boogher put improvements on the property out of her own money to the amount of \$5000, thereby becoming a creditor of the company in said sum. Though custom increased and expenses were reduced under Mrs. Boogher's management, the creditors of the company were pressing and business dull; hence the obligations of the company could not be met and in February, 1908, the company executed a deed of trust on the household furniture, fixtures and chattels of every kind in the hotel building, and all the other personal property of the Monticello Company situated in and about the premises, "including all cash, bills, book accounts, claims, demands, choses in action, judgments, evidences of debt and all books, consisting of ledgers, journals, cash books, day books, blotters, memoranda and all other books and papers showing any such accounts, claims, choses in action, judgments and demands, and any and all other property of any name and description whatsoever of the said party of the first part and wheresoever situated, including the goodwill, leases and leasehold estates and hereditaments be-

longing to said party of the first part; it being the intention of this conveyance to sell, assign and convey to said party of the second part any and all property belonging to said party of the first part, wherever situated, whether herein specifically mentioned and described or not." The trustee Taylor was given power to collect all sums of money owing the Hotel Company and for that purpose might institute and maintain suits at law and in equity, or use any means deemed proper by him. The deed of trust was for the benefit of one hundred and one creditors of the Monticello Company who were named and the amount of each claim specified, the several amounts totalling about \$30,000. Appellant, Adam Roth Grocery Company, was one of the enumerated creditors and its claim is stated to be \$1580.81, though the evidence shows its demand consisted of two promissory notes of \$290.10 each, dated January 17, 1907, payable in thirty and sixty days after date with six per cent interest. Possibly it may have held an open account against the Monticello Company besides. The deed of trust to Taylor, after enumerating the one hundred and one creditors, said the intention of the instrument was to secure those creditors the amounts actually owing them, whether correctly stated or not, and, furthermore, to include among the beneficiaries of the deed of trust, all creditors and other persons having just and lawful demands and claims against the Monticello Company whether named or not. In case default was made in payment of the notes, debts, obligations or any part thereof, or any one of them, or of the interest due thereon, it was provided the conveyance should remain in full force and effect, and the trustee or his successor should take immediate possession of the property and effects conveyed, should proceed to sell the same, or a portion thereof, at private sale in such manner as he might deem best, or when he deemed it would be to the advantage of all the beneficiaries, might sell the property and effects, or the remainder, or any part thereof,

at public sale, upon conditions we need not relate. After the execution of this deed of trust the trustee Taylor took possession of the hotel building and premises and the personal property in them, and believing it to be for the best interest of all parties concerned, continued to operate the hotel, Mrs. Boogher, the previous manager, remaining in charge, but conducting it for the trustee. While affairs were in that condition and on March 3, 1908, appellant, the Adam Roth Grocery Company, instituted this action, which is in the nature of a suit in equity against the Monticello Company, Elizabeth Boogher, John H. Boogher, Frank M. White and J. William Taylor. The petition alleges various facts already stated about the organization of the Monticello Company and the increase of its capital stock, that since January, 1907, and long prior thereto, respondents Elizabeth and John H. Boogher and Frank M. White have been managing and directing officers of the corporation, and in complete control of its property and assets except as afterwards stated, and hold the offices heretofore stated; alleges the Monticello Company is indebted to appellant in the two notes mentioned and also states its indebtedness on an open account to the amount of \$576.89; alleges that on October 23, 1907, the Monticello Company's assets aggregating \$50,000 were in the possession of the individual respondents as its officers, and the liabilities of the corporation did not exceed \$21,500; that since said date the individual respondents had unlawfully converted the property and assets of the company to their own use and had concealed and disposed of them to the extent of one hundred thousand dollars, thereby completely depriving the corporation of the use and ownership of its assets and appellant of an opportunity to collect its demands out of them; alleges the assets were only \$25,000 and its liabilities exceeded \$30,000 at the date of the filing of the petition; alleges the capital stock of \$150,000 was not fully subscribed at the time of the increase of the stock;

in fact only about \$115,000 had been actually paid to the treasurer of the corporation by the various subscribers and there was a sum due and owing the corporation on the capital stock in the sum of \$35,000 or more; that the parties from whom said sums were due were unknown to the petitioner and could only be ascertained by an inspection of the books and records of the company; that the officers of the company, Elizabeth A. and John H. Boogher and Frank White, had failed to enforce payment of the balance due on said capital stock; then alleges the Monticello Company was indebted to various persons in the sum of \$30,000, a great portion of which indebtedness was unpaid and past due; that a large number of suits had been instituted against said company and judgments procured thereon and executions sued out on said judgments and an effort was being made to enforce the same against the property of the company; then alleges the assets of the Monticello Company consist of the leasehold aforesaid, together with the furnishings and fixtures used in the operation of the hotel, the business of said company and a large number of outstanding accounts due from the patrons for board and lodging; alleges next the reservation in the instrument of lease of a first lien on said assets to secure the payment of rent, taxes and assessments reserved in the contract of lease to be paid by the Monticello Company; alleges also the second mortgage aforesaid and that the amount due on the debt secured by said mortgage was \$6000; that the officers of the company had been neglecting the business and wasting and misappropriating the property and assets, had permitted defaults to occur under both chattel mortgages, and the holders of them were threatening to foreclose; that the officers of the company were aiding and abetting said foreclosure so they might be enabled to purchase the property at the foreclosure sale and secure the same for their own benefit; that Taylor was not operating the property under any authority granted in

the deed of trust to him, had given no security for the faithful performance of his duties, and his acts were not in any manner under the control of the company; that the conveyance was made for the use and benefit of said Elizabeth S. Boogher, who claims said corporation is indebted to her in the sum of \$5000; that Taylor is the personal selection and representative of her interests and subject to her control, wishes and interests and not to the interest and wishes of the creditors of the company; that the conveyance was made to encumber and tie up the assets of the company so its creditors could not reach them, instead of for the benefit of creditors; that the company is insolvent and the Adam Roth Grocery Company and other creditors of it have no adequate remedy whereby their rights may be preserved, and unless a receiver is appointed as prayed in the petition, the petitioners and all other creditors are in grave danger of losing their accounts. Instead of giving the prayer for relief contained in the petition, it will elucidate better the objects of plaintiff to excerpt from its brief the relief asked:

“The purpose of the action is to cause all of the said personal defendants and all other officers, agents and trustees of said defendant corporation, to account for their official conduct in the management and disposition of the funds, property and business committed to their charge; to order, decree and compel payment by them to said defendant corporation and to its creditors of all sums of money, and of the value of all property which they have acquired to themselves, or transferred to others, or may have lost or wasted by any violation of their duties, or abuse of their powers as such directors, managers, trustees or other officers of said defendant corporation; that the court will fully administer as a trust fund all and singular the property, rights and business of said defendant corporation, including said hotel, with all and singular its appurtenances so held by lease as aforesaid, and will marshal

all assets and ascertain the several respective liens and priorities existing thereon, and enforce and decree the right, liens and equities of each and all creditors of said defendant corporation as the same may be finally ascertained and decreed by the court; that for the purpose of enforcing the rights and equities of the creditors of said defendant corporation, as well as protecting the rights, interest and property of said defendant corporation, as well as to preserve the unity of the business and property of said Hotel Monticello Company, and of preventing the disruption thereof by separate executions or foreclosures, and of preventing the loss and forfeiture of its leasehold and other property, this court forthwith appoint a receiver of all and singular the property rights and assets of every nature and wheresoever situated, held, owned or controlled by said defendant corporation, together with all rights and contracts, with full authority to operate and manage the same under the direction of the court; that all the officers, managers, agents and employees of said defendant hotel company, and that defendant J. Wm. Taylor, a trustee for the creditors appointed by defendants, be required forthwith to deliver to said receiver the possession of all and singular, each and every part of said property and assets of said defendant and corporation wheresoever situated, also all books and records of said defendant corporation in any way relating to its business or the operation of said hotel; that at such time as may be found just and proper the property of said defendant hotel company may be ordered to be sold and the proceeds distributed among those entitled thereto, and for such other and further relief as to the court may seem proper and necessary to fully protect and enforce the rights and equities of your petitioner and all other creditors of said company."

Separate answers were filed by each of the defendants, but we need not recite their contents further than to say they denied all misappropriation of assets, wast-

ing of same, neglecting the business of the company and fraudulent or colorable conduct, or that the deed of trust to Taylor was made for any other purpose than the one it purports to have been made for; deny in short all the allegations of wrongdoing. In one or the other of the answers most of the facts in connection with the life and business of the Monticello Company are developed; Taylor alleges his possession of the assets as trustee, subject to the possession of the mortgagors, which is acquiesced in by all the creditors except plaintiff. A statement rendered by Frank White, a director of the company, to the Bradstreet Agency on October 24, 1907, showing the amount of the common and preferred stock of the company and its assets and liabilities, was put in evidence. This statement showed \$2000 cash on hand; bills receivable \$50,000; merchandise on hand \$5000; machinery and fixtures \$68,000; leasehold valued at \$60,000 and the good will of the business and new construction of buildings, \$10,000. The liabilities shown were capital stock paid in \$115,000, accounts payable \$10,000, chattel mortgages on all kinds of property \$6500; money borrowed from banks, \$5000, total liabilities \$136,500. This made a prima facie showing at said date of \$13,500 over and above all liabilities. It also showed the amount of the year's business was \$100,000 and annual expenses \$80,000; insurance on merchandise and fixtures \$50,000; insurance on buildings and plant \$140,000. Entries from the records of the meeting of the board of directors of the Monticello Company were also put in evidence, but we need not recite them. The trustee Taylor collected but little money, for about all the property conveyed to him by the deed of trust, except the bills receivable due the Monticello Company, was taken possession of by the mortgagees under the first chattel mortgage and afterwards by the mortgagees in the second chattel mortgage and the lease was declared forfeited. A sale of the furniture and fixtures under these mortgages occurred and Mrs.



Boogher bid in the furniture in order to protect herself as a general creditor of the Monticello Company, afterwards selling the furniture to the Revere Realty Company at a profit; and this is one matter of complaint, though not charged in the petition, it being contended her purchase at the sale under the mortgage accrued to the benefit of the Monticello Company. It seems she paid \$8000 and sold for \$37,000, taking in payment from the Realty Company, she said, notes executed by the Buckingham Hotel Company. She testified, however, as we understand, that besides the amount bid for the furniture, she had to clear off liens amounting to many thousands of dollars, mechanics' liens and some notes she had assumed. The general tenor of her testimony is that she made a small profit, but only a small one by the purchase. The forfeiture of the lease and the foreclosure of the two chattel mortgages on the furniture and fixtures and personal property, had occurred prior to the hearing below of the present suit.

GOODE, J. (after stating the facts).—In the joinder of parties defendant and allegations and varieties of relief prayed, the petition appears to be multifarious and an objection on that score was lodged against it, but only in the answers. We think of but one contingency in which Taylor would have been a proper co-defendant with the officers of the Monticello Company to a bill charging said officers with having wasted and misappropriated the assets of the company. That contingency was a confederacy of the officers to misappropriate its assets and the execution of the deed of trust to Taylor to further the scheme, which he acceded to with knowledge of the fraudulent purpose. Unless there was a transaction of that character, Taylor had no connection with any unlawful diversion of the assets by his co-defendants, but such a diversion raised an independent

case against them to which he ought not to be a party. The record contains no word of proof of any conspiracy between Taylor and the other defendants to make away with the assets of the company, or hinder or defraud any of its creditors; not a word to prove any illegal act or purpose to which Taylor was a party. His connection with whatever occurred was confined to the trusteeship in the deed of trust executed by the company on February 20, 1908, which instrument transferred all the assets of the company for the benefit of all its creditors, and instead of creating preferences, declared if the hundred or more creditors enumerated were not all, the deed should enure as well to the benefit of those omitted. The company had the right to transfer its assets in that manner and for the stated purpose, instead of resorting to a general assignment. We understand counsel for plaintiff to contend the corporation, if insolvent, could not dispose of its property by a deed of trust to Taylor which would put it out of business, because its assets, in the event of insolvency, became a trust fund for the benefit of its creditors, and a court of equity should administer the assets for their benefit and appoint a receiver to take over the property and collect those not in possession, including liabilities on unpaid shares of stock; that the court should settle priorities and claims among creditors, distribute the assets among them according to their priorities and the amounts of their demands, and wind up the company. We do not assent to that proposition as one applicable to every instance, regardless of whether the company had attempted to dispose of its property to pay its debts and of whether or not there was fraud in the disposition made by the corporation. We hold a failing company, acting in good faith, may itself provide for the distribution of its assets or their proceeds among its creditors, by conveying them to a trustee and conferring on him the power to collect and sell assets and distribute the proceeds. In some measure the assets of an insol-

vent corporation, which is not able to continue in business, are treated as a trust fund for the benefit of creditors, and the right of the company to dispose of them is abridged on the theory that, if the company can no longer pursue the ends it was created for, the law may lay hold of its property to distribute it among creditors as they are entitled. But we do not understand that if this policy of the law will be attained as well by a disposition of the property made by the company itself, the courts will insist, nevertheless, on taking charge. Whether administration by an assignee or trustee appointed by the company will be interfered with, will depend on the facts, and chiefly on the presence of good or bad faith. The courts have considered mainly the validity of preferences in transfers of property by companies to pay debts and have upheld the right to prefer creditors in good faith; and certainly if there is such a right, then a *bona fide* transfer of assets to pay all creditors *pro rata* is valid. [Larrabee v. Franklin Bank, 114 Mo. 592, 21 S. W. 747; Alberger v. Bank, 123 Mo. 313, 27 S. W. 657; Lyons-Thomas Hdw. Co. v. Stove Co., 22 L. R. A. 802.] The cases cited by counsel for plaintiff where such conveyances were set aside and a court of equity took charge of the assets and wound up the company, contained elements of fraud which vitiated the conveyances made by the companies; the fact of fraud consisting of an unlawful preference of the officers of the company as creditors or some other disposition of the assets incompatible with just distribution. [Kankakee Mill Co. v. Kampe, 38 Mo. App. 239; Merchants Bank v. Const. Co., 53 Fed. 314; Doe v. Transportation Co., 64 Fed. 928.] In certain cases plaintiff invokes, the courts upheld the instrument by which the company disposed of its assets and merely settled by decree some question between creditors as to their respective demands against part of the assets. [White v. Land Co., 49 Mo. App. 450; Burnham v. Smith, 82 Mo. App. 35.] Just here it is proper to say the creditors in the

deed of trust to Taylor would be necessary parties in a suit to set aside the conveyance; or, at least, enough of them fairly to represent the others would be necessary. Plaintiff alleged it filed its bill for the benefit of all creditors who might wish to come in and take advantage of the relief granted, but the evidence fails to show any creditor but him has objected to the deed of trust. We will remark further, before passing the case as regards Taylor, that as soon as he took possession as trustee under the deed of trust to him, the mortgagees in prior incumbrances on the property supplanted his possession under said deed, but arranged with him to hold possession for them; conduct which is far from suggesting want of confidence in him; much less that he was in a scheme to defraud creditors in the interest of Mr. and Mrs. Boogher and Frank White, by making away with assets; for all that went into his hands under the third incumbrance were sold from him under the prior incumbrances. It seems he collected some accounts and maybe got in about \$1000 which might go to the creditors mentioned in the conveyance to him. The only way in which he could assist a fraudulent enterprise would be by omitting to collect assets; but that he had done this or anything else that was wrong, or was under the domination of his co-defendants, the officers of the Monticello Company, there is no proof. The terms of the conveyance are broad enough to empower him to sue for what was owing on unpaid shares, and, presumably, in the absence of proof to the contrary, he will sue if he should. [*Lionberger v. Bank*, 10 Mo. App. 499.] We perceive no ground in the present record for removing Taylor from his trusteeship, or for the court to appoint a receiver of what little assets have come into his hands.

Looking at other allegations of the bill, we find Elizabeth and John H. Boogher and Frank White, officers of the Monticello Company, charged with having converted \$100,000 of its assets between October 23, 1907,

and the date the petition was filed, March 3, 1908. The averment is that after the first date said defendants unlawfully converted said amount of the property and assets of the Monticello Company to their own uses and hid, concealed and disposed of said assets. We believe the only evidence relied on as proof of the charge was the statement furnished to a Mercantile Agency by Frank White, October 23, 1907. The assets shown in the statement were machinery, and fixtures in the hotel valued at \$68,000, the leasehold at \$60,000, the good will of the business \$10,000, merchandise \$5000 and bills receivable \$5000, which items composed \$148,000 of the \$150,000 of assets. The machinery and fixtures, the leasehold and the good will, were lost to the company by the foreclosure of the first two chattel deeds of trust, and leaving out of view the purchase of the furniture by Mrs. White at the sale under said incumbrances, which will be dealt with *infra*, it will not be contended defendants converted to their own use any of the machinery, furniture, fixtures, leasehold or good will. The merchandise, bills receivable and \$2000 cash on hand at the date of the statement, could have been appropriated, but there is no evidence to prove any part of either item was, and it is not contended there is evidence of that tendency. The accusation that defendants made away with \$100,000 worth of assets, vanishes on scrutiny.

It is alleged in the petition Mr. and Mrs. Boogher and Frank White aided and abetted foreclosures of the mortgages in order to acquire control of the property for themselves; but this charge also is unsupported. After Mrs. Boogher acquired part of the stock of the company and took charge of the hotel, she improved and added largely to the furniture in the rooms and painted and decorated the interior of the hotel at her own expense, thereby becoming a creditor of the company for a considerable sum. The evidence shows clearly the failure of the company was due, in part, to the

financial panic which was coincident with her management, but mainly to the insistence of creditors, whose debts had accumulated under prior management, that they be paid, and their refusal to wait until she could put the hotel on a paying basis and discharge the company's liabilities.

Complaint is made that Mrs. Boogher purchased the furniture at sales under the first and second deeds of trust and afterwards sold it at a profit, which she retained instead of turning it in to the company or to Taylor the trustee. The purchases were made at sales at public vendue to the highest bidder and we doubt if the law is against Mrs. Boogher's buying for herself under those circumstances; especially when the company had ceased to be a going concern and the officers were no longer managing its business affairs. However, we decide nothing on this point, because it is not in the case. The petition contains no averment regarding the matter, which, indeed, transpired subsequent to the filing of this suit.

We have found no clear evidence that unpaid shares of stock were outstanding, whereon the liability of the stockholders should be enforced. We do not say there is no such liability, but merely that it was not proved, and, in truth, no great stress is laid upon that phase of the case.

The validity of the retirement of preferred shares to the amount of \$35,000 in January, 1908, and just before Mrs. Boogher acquired her interest, looks dubious. The preferred shares constituted a liability of the company, and the company had a right to retire them in a prescribed way, which involved a reduction of the amount of the capital stock. The present record leaves in obscurity the circumstances of the surrender of said shares. We cannot ascertain whether they had been issued by the company to individuals or were treasury stock; or, if they had been issued, whether the holders had paid for them. As shown in the statement, *supra*,

the plan provided for the retirement of the preferred shares was to create a sinking fund through a series of years to take them up. This arrangement was altered by reason of the prosperity of the company during the World's Fair period of 1904, as the officers of the company believed the profits of said year would suffice to retire the shares and that the welfare of the company would be advanced by retiring them at once. The shares appear to have been entrusted to the Germania Trust Company, to be surrendered by it when enough money to pay them was deposited and after proper steps had been taken to reduce the capital stock of the hotel company. As far as we can discern from the evidence, this step was not taken, and we know not why the shares passed from the custody of the Germania Company. The only positive testimony on the subject of their retirement was that of Mr. Boogher, who said the company made \$35,000 during the World's Fair which was used to pay old debts, and in consideration of the old debts having been paid, he, as "holder of all the preferred stock certificates, closed the matter and the preferred stock was simply cancelled." That explanation of the transaction is not clear, though we do not mean to intimate it suggests illegality, but merely that it does not explain the affair so as to render it intelligible to a person unfamiliar with the facts. Plaintiff seems to complain that cash of the company was used to retire the shares, which constituted a diversion of the company's assets. We can think of no condition that would make it right for the company to pay the holders of the shares their face value out of the company's money until the capital stock had been reduced. But there is no proof such a course was pursued. Boogher's testimony indicates he held the shares for himself or in some trust capacity—strictly considered, that he held them as owner—and because the debts of the company to the face value of the shares had been paid out of the company's earnings, he surrendered the shares for can-

cellation. The transaction is puzzling; but it was not shown the assets of the company were applied to pay for the shares. On the contrary, Boogher's testimony went to prove the company's cash was used to pay its debts, and for some reason, he was willing to cancel them after the company's debts were paid. But this fact is to be noted: The cancellation did not occur until January, 1908. We decide nothing whatever about the legality of that transaction, but simply say there is no evidence in this record of a misappropriation of the company's assets in connection with it.

In conclusion we wish to say that not only is the petition rambling and multifarious, but the little evidence adduced is vague and fragmentary, and really leaves the gist of the case, to-wit, the retirement of the bulk of the preferred shares, incomprehensible. It is clear, however, that no ground was shown for removing the trustee or appointing a receiver. If Mr. Boogher, or any one else, received something for the preferred shares, and ought to account for what was received, a proceeding would lie against such person in the name of the proper plaintiff.

The judgment is affirmed. All concur.

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**STATE OF MISSOURI, Respondent, v. FLYNN  
THOMPSON, Appellant.**

St. Louis Court of Appeals, May 17, 1910.

**DRAMSHOP KEEPER: Local Option Election: Conviction After Adoption of Local Option Law for Offense Committed Before its Adoption.** This case involves the same questions of law determined in *State v. Walker*, 129 Mo. App. 371, and is determined in conformity with the opinion therein rendered.

**Appeal from Howell Circuit Court.—Hon. W. N. Evans,  
Judge.**



**AFFIRMED.**

*Van Wormer, Hogan & Delaney* for appellant.

*J. L. Bess* for respondent.

GOODE, J.—This is an indictment against defendant for an illegal sale of liquor to a minor. It was submitted to the court without the introduction of evidence on an agreed statement of facts. Defendant admitted he sold the liquor as charged and set up a defense that he should not be convicted because, after the sale and after the indictment, but prior to the trial, the Dramshop Law had been repealed in Howell county by an election held under the local option statutes at which the voters voted against the sale of liquors in the county. This case involves the same question of law determined by this court in *State v. Walker*, 129 Mo. App. 371, 108 S. W. 615, and certified to the Supreme Court, where it was decided as we decided it, our opinion being adopted. The present case has been held to await the decision of the *Walker* case by the Supreme Court, and must be determined in conformity with the opinion therein rendered. Accordingly the judgment will be affirmed. All concur.

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HENRY CHITTENDEN et al., Appellants, v. WILLIAM T. GRAVES et al., Respondents.

St. Louis Court of Appeals, May 17, 1910.

1. **LIMITATION: Justices' Courts: Judgments: Barred In Five Years.** An action on a justice's judgment is barred after five years.
2. ———: ———: ———: **Transcript Filed in Circuit Court: Limitation.** Though section 4019, Revised Statutes 1899, gives a justice's judgment many of the attributes of a judgment of the circuit court, when the transcript is filed in the office

of the circuit clerk, and such court may modify it, the judgment remains that of the justice, and not that of a court of record, as regards the limitation period within which an action on it will lie.

Appeal from Lewis Circuit Court.—*Hon. Chas. D. Stewart*, Judge.

**AFFIRMED AND REMANDED.**

*C. M. Ewalt* for appellants.

(1) When the transcript of a justice's judgment is filed in the office of the clerk of the circuit court it becomes as a judgment of the circuit court, its life and efficacy being the same. *Tracy v. Whitsett*, 51 Mo. App. 149. (2) One of the ways of giving life and carrying into effect a judgment of the circuit court is by instituting a suit thereon before the period of limitation has expired, which is ten years. It may be observed that the statutory proceeding by *scire facias*, and issuing an execution, has not taken away the right of a plaintiff to sue on his judgment. *Pears v. Goff*, 76 Mo. 92; *Great-house v. Smith*, 4 Ill. 541; *Ames v. Hoy*, 12 Cal. 11. (3) Where the transcript of a judgment of a justice of the peace is filed in the circuit court and entered in the judgment docket, the Statute of Limitations commences to run from the time of such filing and entry, and not from the date of the justice's finding. *Burr v. Engles*, 24 Ark. 283.

*Hilbert & Hilbert* and *A. F. Haney* for respondent.

An action on the judgment of a justice of the peace must be commenced within five years after the judgment is rendered by the justice. If not commenced within that time, it is barred by the Statute of Limitations. *R. S. 1899*, sec. 4273; *Sublette v. Railroad*, 96 Mo. App. 113; *Coomes v. Moore*, 57 Mo. 338; *Long v. Tharmond*, 83 Mo. App. 227; *Pierce v. Davidson*, 58 Mo. App. 106.

GOODE, J.—These plaintiffs recovered a judgment before E. Frank Henderson, justice of the peace, September 28, 1897, against defendant for \$135.35 and costs taxed at three dollars. October 28, 1897 a transcript of that judgment was filed in the office of the circuit clerk of Lewis county, and on October 26, 1907, plaintiff filed a petition in the circuit court of said county wherein they alleged the rendition of the judgment by the justice of the peace September 28, 1897, as stated, the filing of the transcript October 28, 1897, in the circuit clerk's office; that no part of said judgment had been paid, and prayed judgment against defendant for the amount of it, which by that time was \$228.95, the court found. Judgment was entered as prayed on the justice's judgment, or on the transcript of it; but afterward the court granted a new trial on the motion of defendant Graves who pleaded the Statute of Limitations; but was left standing against Montgomery, who failed to answer, and against whom a default judgment was rendered, and from the order allowing a new trial to Graves, this appeal was taken. The reasons assigned by the court for sustaining the motion for new trial were that the judgment of the circuit court was against the law and the evidence and no action on the judgment of the justice of the peace could be maintained after five years; that is to say, an action on such judgment would be barred after five years. There was no evidence put in except matters of record, and the question presented on the appeal is one of law.

The theory of plaintiffs is, that when the transcript of the judgment of the justice was filed in the office of the clerk of the circuit court, the justice's judgment became a judgment of the circuit court on the date of the filing, to-wit, October 28, 1897, and, therefore, this action, which was instituted October 26, 1907, was in time, because an action on a judgment of a court of record may be brought at any time within ten years. [R. S. 1899, sec. 4273.] It has been decided in this

State, an action on a justice's judgment is barred after five years. [Sublette v. Railroad, 96 Mo. App. 113, 69 S. W. 745.] Counsel for plaintiff argues that the statute which provides for the filing of transcripts of justices' judgments in the circuit court, prevents this rule from being applicable to an action on what counsel terms "a transcript judgment." It is true the statute gives the justice's judgment many of the attributes of a judgment of the circuit court when the transcript is filed in the office of the circuit clerk. It creates a lien on real estate belonging to the defendant situate in the county, may be revived and carried into effect in like manner as a judgment of the circuit court, and said court may modify it. [R. S. 1889, sec. 4019; Babb v. Bruere, 23 Mo. App. 604; Bauer v. Bauer, 44 Mo. 61.] Nevertheless after the transcript is filed, the judgment is still that of the court which rendered it and not, we think, of a court of record as regards the limitation period within which an action on it will lie, as well as in other qualities. [Pierce v. Davidson, 58 Mo. App. 106; Coomes v. Moore, 57 Mo. 338.] We find nothing in the statutes which warrants the distinction attempted to be taken between a justice's judgment after a transcript of it has been filed in the office of the circuit clerk and what counsel for plaintiff designates as a "transcript judgment;" no section or clause which is intended to make the filing of the transcript create a judgment of the latter kind and extend the limitation of actions on it to ten years. Moreover, to sustain plaintiff's case it would be necessary to allow a longer period of limitation for actions on judgments of justices of the peace than is allowed for actions on judgments of courts of record. The present judgment was rendered September 28, 1897, and would be barred by the ten years' Statute of Limitations, unless, as plaintiff's counsel argues, a new judgment came into existence by virtue of the filing of the transcript on October 28. On the whole we think the action must fail. In so far as it was taken

for granted in the reasoning of the opinion in Bick v. Robbins, 131 Mo. App. 670, 111 S. W. 612, that an action on a justice's judgment was not barred until ten years after its rendition, said opinion is disapproved.

The judgment below for a new trial is affirmed and the cause remanded. All concur.

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OLIVER C. CLAY, Appellant, v. JAMES M. BROWN  
et al., Respondents.

St. Louis Court of Appeals, May 17, 1910.

1. **ATTORNEY AND CLIENT: Employment of Attorney: Evidence.** In an action by an attorney against a corporation and a stockholder thereof for services performed for the corporation in collecting fire insurance under an alleged contract of employment, the fact that the individual defendant's interest in the policy was only that of a stockholder was a circumstance to be weighed by the jury on the issue whether he was personally liable to plaintiff, there being nothing in the situation to preclude a finding of dual employment.
2. ———: ———: **Failure to Answer Letters: Instruction.** In an action by an attorney against a corporation and its president for services performed for the corporation, under an alleged contract of employment by both defendants, where there was evidence that the attorney wrote several letters to the president, stating that he had been employed, to which the latter failed to reply, an instruction that the failure to answer plaintiff's letters did not constitute an admission of defendant's liability under the contract alleged to have been made was erroneous, since, although such failure was not equivalent to an admission of liability, still it was a circumstance to go to the jury on the question whether a contract of employment had been made.
3. ———: ———: **Evidence: Admissions.** In an action by an attorney against a corporation and a stockholder thereof, for services in collecting insurance money, admissions made by the individual defendant as to the employment were competent against him, whether he was interested in the insurance money other than as a stockholder or not, or whether he was at the time acting as agent for the company.

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4. **CORPORATIONS: Officers: Delegation of Power: Employment of Attorney: Attorney and Client.** While the president of a corporation could not delegate any discretion he had as such officer, he might empower his brother to speak to an attorney in behalf of the company and retain such attorney's services.

Appeal from Lewis Circuit Court.—*Hon. Chas. D. Stewart, Judge.*

REVERSED AND REMANDED.

*E. R. McKee and A. F. Haney* for appellant.

(1) The court erred in giving to the jury instruction No. 6 on behalf of defendants. (a) This instruction wrongfully excludes the jury from considering the admissions of defendants arising from the failure of defendant Brown to answer or respond to the two letters written to him by plaintiff in the latter half of December, 1906. 1 Ency. of Ev., pp. 359, 361; *Learned v. Tillotson*, 97 N. Y. 1, 48 Am. Rep. 508; *Advertising Co. v. Wanamaker & Brown*, 115 Mo. App. 270. (b) This instruction is erroneous for the further reason that the failure of defendant Brown to answer said letters is evidence of admission, not only against himself, but also against his co-defendant, Canton Milling Company. The property was in the name of the Canton Milling Company and the insurance was to be collected for it or in its name. Defendant Brown was president and manager and the spokesman and representative of the company in all its dealings with the world. Plaintiff was employed as attorney for both defendants and the agreement was that he would be paid by the defendants. Hence, plaintiff's letters to Brown asserting his claim of services performed in the matter of said property, operated also as notice thereof to the company. *Mechem on Agency*, sec. 729; *Malerek v. Railroad*, 57 Mo. 17; *Smith v. Boyd*, 162 Mo. 146. The managing officers of corporations have power to employ attorneys and counselors on behalf of their corporations, and they have

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this power without express delegations of power or formal resolutions to that effect. *Bank v. Gilstrap*, 45 Mo. 419; *Southgate v. Railroad*, 61 Mo. 89; *Rosenbaum v. Gilliam*, 101 Mo. App. 126; *Lewis v. Publishing Co.*, 77 Mo. App. 434; *Maupin v. Mining Co.*, 78 Mo. 24; *Thompson v. School District*, 71 Mo. 495. (c) This instruction is erroneous for the further reason that the failure of defendant Brown to answer plaintiff's said letters is proper evidence of ratification by defendants of John Brown's act of employing plaintiff as their attorney. The authority or agency of a person may be shown by facts and circumstances showing that his acting as such was ratified. *Robertson v. Clevenger*, 111 Mo. App. 622; *Middleton v. Railroad*, 62 Mo. 579; *Bank v. Fricke*, 75 Mo. 178; *Turner v. Railroad*, 51 Mo. 501; *Suddaith v. Lime Co.*, 79 Mo. App. 585. Neglect to promptly disavow such act will be binding on the corporation. *Bank v. Fricke*, 75 Mo. 178; *Abbott's Trial Brief on Mode of Proving Facts* (w. Ed.), 547. Said rule is applicable to corporations. *Advertising Co. v. Wanamaker & Brown*, 115 Mo. App. 270. (2) The court erred in giving to the jury instruction No. 3 on behalf of defendants. This instruction is erroneous because it debars the jury from considering the testimony of W. T. Hope to the effect that, sometime after the fire, defendant Brown told him that he had sent his brother, John Brown, to employ plaintiff to aid and assist in adjusting his insurance loss. (a) Said admission is proper evidence in support of plaintiff's case, because said James M. Brown is a party defendant herein, and there is evidence tending to show that he had obligated himself personally to the plaintiff in the matter of plaintiff's employment. Admissions of a party against his interest are always admissible in evidence against him. *Sheperd v. Transit Co.*, 189 Mo. 362. An agent may contract in such a way as to render both himself and his principal responsible, whether his principal be or be not made known at the

time of the contract. Story on Agency, sec. 270; Nichols, Shepard & Co. v. Kern, 32 Mo. App. 6; Ziegler v. Fallon, 28 Mo. App. 295. (b) The evidence of said admission by defendant, Brown, to witness Hope is also proper evidence for the jury to consider as impeaching the testimony of said Brown as a witness—and although no foundation is laid therefor. Owens v. Railroad, 95 Mo. 69. (3) But, said admission of defendant, Brown, to witness Hope is admissible not only against himself, but also as original evidence against defendant Milling Co. Lea v. Mercantile Co., 42 So. 415, 8 L. R. A. (N. S.) 279; Jones v. Williams, 139 Mo. 1.

*Jerry M. Jeffries* for respondents.

(1) An agent, unless a mere ministerial one, is personal, and the authority cannot be delegated by such agent. Grady v. American C. Ins. Co., 60 Mo. 116; Bowman Co. v. Lickey, 86 Mo. App. 61; Land & Lumber Co. v. Chisom, 204 Mo. 371. (2) Admission or statement of an agent, that he is an agent is absolutely incompetent in the trial of a case for the purpose of establishing an agency. Bank v. Morris, 125 Mo. 343; Bank v. Leyser, 116 Mo. 151; Carp v. Ins. Co., 203 Mo. 295; Craighead v. Wells, 21 Mo. 404. (3) Declaration of an agent made after the transaction has been completed and in no wise connected with it, are mere hearsay and are inadmissible against the principal. The declaration of such agent to be admissible must be a part of the *res gestae* and within a scope of his authority. Ins. Co. v. Fillingham, 85 Mo. App. 534; Helm v. Car Co., 98 Mo. App. 419; Oil Co. v. Jackson Z. Co., 98 Mo. App. 324; Phillips v. Mfg. Co., 129 Mo. App. 396; Rodman v. Railroad, 185 Mo. 1. (4) While a corporation acts through its officers and agents, an officer is nothing more than an agent of such corporation, and to make his admission binding upon the company, such admission must be made contemporaneous with his per-



forming some business of the company. *Ins. Co. v. Fillingham*, 85 Mo. App. 534; *Milling Co. v. Burns*, 152 Mo. 350; *Jones v. Williams*, 139 Mo. 1. (5) The failure to answer letters asserting a demand is not an admission, by the person written to, of the indebtedness. *Scott v. Haynes*, 12 Mo. App. 597; *Learned v. Tillotson*, 97 N. Y. 1; *Advertising Co. v. Wanamaker & Brown*, 115 Mo. App. 270.

GOODE, J.—Plaintiff is an attorney at law practicing his profession in Lewis county. James M. Brown is president and chief stockholder in the Canton Milling Company, and is co-defendant with it. The Milling Company had a flour mill and elevator in Canton which were destroyed by fire in December, 1906, as were a large part of the contents. Policies of fire insurance had been issued on the property by some insurance companies to the amount of \$18,500. Plaintiff alleges that thereafter and about December 12, 1906, he was employed by defendants as their attorney to advise and assist them in collecting the insurance on the property, or as much of it as could be collected, and defendants promised to pay him what his services were reasonably worth. Pursuant to this employment plaintiff rendered professional services to defendants, advising them about their claims against the insurance companies, with the result defendants were able to collect \$16,500 of the insurance; that the reasonable value of his services was \$500, for which he prayed judgment. In answer, defendant Brown denied the averments of the petition and further alleged he had no interest in the property covered by the insurance or in the insurance money except as a stockholder in the Canton Milling Company denied that either he or any one for him had contracted with plaintiff to collect the amounts due on the policies. The Milling Company for its separate answer denied

the averments of the petition regarding the employment of plaintiff by defendants to collect the insurance money due the Milling Company for its loss, denied plaintiff was retained or employed to assist in any way about the matter or to furnish advice or render any services whatever; denied that by his advice and assistance the Milling Company was able to collect \$16,500 or any other sum from the insurance companies; alleged if plaintiff had anything to do with the collection of the money or gave any advice about it, the fact was unknown to defendant and it was done without any contract of employment entered into by defendant; alleged no dispute arose between the insurance companies and the Milling Company in regard to the loss, but the amount due the Milling Company was adjusted and paid without contest. Plaintiff testified thus: He was employed to represent defendant James M. Brown and the Milling Company December 11, 1906, two days after the fire; on said day John Brown, brother of defendant James Brown, entered plaintiff's office, stated who he was, and that his residence was in Vienna, Illinois; said his brother James M. Brown was sick in bed and had sent him to employ plaintiff to aid in the settlement of the loss with the insurance companies; plaintiff conferred privately with said John Brown, got all the particulars of the loss from him and gave him advice about getting the books of the company together, all bills of purchases and other competent evidence to show the amount of the loss; said he conferred with John Brown about thirty minutes, when the latter left and he (plaintiff) never saw him any more; said he wrote James M. Brown that John Brown had called and employed him in an insurance matter, and James Brown never replied to the letter; plaintiff wrote again, twice, but received no replies to those letters; on June 2d, he wrote the fourth letter, stating John Brown had employed him and asked James Brown to call and settle. To this letter James Brown replied, admitting the re-

ceipt of the previous letters, but denying plaintiff had ever been employed or that he (James Brown) or the Milling Company owed plaintiff anything. Other testimony was given tending to prove plaintiff had been retained by John Brown with the knowledge and by the direction of James M. Brown. It was proved about sixteen thousand dollars were paid the Milling Company by the insurance companies. John Brown testified he was not the agent of James Brown or the Milling Company to employ plaintiff and did not employ him, but merely said to plaintiff, a few days after the fire, if an attorney was needed or a law suit occurred, "we (meaning the company) would want an attorney to help Mr. Jeffries;" that the adjuster would probably arrive the next day, and if the matter was not adjusted and there had to be litigation over it, he (John Brown) would call on plaintiff and employ him. A witness testified James M. Brown told him some time after the alleged employment he (James M. Brown) had sent his brother John to engage plaintiff to assist in the adjustment of his insurance loss. This conversation occurred on the street in Canton, after defendant Brown had returned from Hot Springs. There being a conflict in the evidence, objections are raised on the appeal to instructions given by the court; but before examining the instructions we will notice the contention that as defendant Brown's only interest in the insurance policies was as a stockholder of the Milling Company, he could not, or at least it should be inferred he did not, employ plaintiff to act as attorney for him individually. The fact that defendant Brown's only interest in the policies was as a stockholder, has a bearing on the probability of his having individually employed plaintiff. It is a circumstance to be weighed by the jury on the issue of whether defendant Brown is answerable personally to plaintiff. But the testimony for plaintiff tends unequivocally to prove John Brown retained plaintiff to represent both the Milling Company and

James M. Brown, and it was for the jury to decide whether plaintiff was employed at all, and if so, by one or both defendants. There is nothing in the situation or the evidence to preclude a finding of dual employment. Defendant Brown's large interest in the company may have led him to be willing and desirous to be a party to the contract and to pay in person part of the fee.

One of the instructions complained of and granted at the instance of defendants, told the jury delay, or even entire failure of defendant Brown to answer plaintiff's letters, was no evidence that John Brown had been authorized to employ plaintiff, and did not constitute an admission of his authority to do so nor an admission of defendant's liability under the contract alleged to have been made between plaintiff and John Brown for defendants. In view of the contents of the unanswered letters, we might not reverse the judgment if we found no other error in the record, but we think the instruction should not have been given. Failure to answer the letters was not equivalent to an admission of the contract or of liability on the part of defendant and so far the instruction was correct; yet we think the failure was a circumstance to go to the jury on the question of whether John Brown had retained plaintiff and by authority of the defendants. These letters were written to James M. Brown in December, shortly after the date of the alleged contract; they informed said Brown his brother John had called on plaintiff December 11th and had retained plaintiff as a lawyer to "represent you and aid you in and about your loss by fire in your mill and other property in Canton, Missouri." The letter further said plaintiff had written to said John Brown and asked him to call, but he had not replied and plaintiff wrote to renew his request; that plaintiff wished to see either John Brown or James M. Brown. Failure to answer the two letters no doubt might be explained so that they would have slight weight as evidence. But

their contents were such as, according to the common course of business, would usually have elicited a reply, repudiating John Brown's authority to employ plaintiff, or the employment itself, if plaintiff's services were not desired and defendant Brown believed he had not been employed, or believed if he had been, that John Brown had acted without authority. The letters were to be considered and weighed by the jury as evidence on those issues. [Learned v. Tillotson, 97 N. Y. 1; 1 Ency. of Ev. 359, 361; and see cases cited in St. Louis Gunning Adv. Co. v. Wanamaker & Brown, 115 Mo. App. 270.] As regards ratification by defendants of what John Brown did, even if he acted without authority, we will say the facts preclude the finding of an intention to ratify plaintiff's employment if it was not authorized in the first place. Touching this point the evidence is materially unlike the evidence in Gunning Co. v. Wanamaker & Brown, and we refer to the opinion in that case for our views (l. c., pp. 282, *et seq.*). The failure of defendant to answer plaintiff's letters is competent only on the issue of whether his employment was authorized and for the reason that men are apt to disclaim promptly such agreements when made by some one else in their behalf without their sanction. We are cited to Scott v. Haymes, 12 Mo. App. 517, as holding the omission to answer a letter constitutes no evidence on a controverted issue. The true application of this doctrine depends on the circumstances of cases. In the one just referred to, the party to whom the letter was addressed had previously expressly repudiated the alleged liability mentioned in the letter and could have done no more by answering it.

Error is assigned on an instruction which said unless the jury found defendant Brown had some interest in the collection of the policies other than as a stockholder of the Milling Company, the jury must not consider any admissions he had made, if they found he had made admissions, unless they also found such admis-

sions were made as agent of the Milling Company and while said Brown was acting as such agent within the scope of his authority and was carrying on some business of the Milling Company. The effect of this instruction was to exclude from the consideration of the jury as evidence against Brown individually, the admission he had made to Hope that he (Jas. M. Brown) had sent his brother to employ plaintiff to help collect the insurance money. Said admission was competent against defendant Brown, whether he was interested in the insurance money other than as a stockholder in the Milling Company, or not, and whether made while transacting its business or on some other occasion. [Schlicker v. Gordon, 19 Mo. App. 479.]

It is insisted James M. Brown had no power to authorize John Brown to act for the Milling Company, because the former himself was but an agent of said company and could not delegate his authority. James M. Brown was president of the Milling Company and could not delegate any discretion he had as such officer; but we know of no rule of law which would prevent him from employing his brother John to speak to plaintiff in behalf of the company and retain his services.

The judgment is reversed and the cause remanded. All concur.

**ST. LOUIS NATIONAL LIFE INSURANCE COMPANY, Respondent, v. INTERNATIONAL BANK OF ST. LOUIS, Appellant.**

St. Louis Court of Appeals, May 17, 1910.

1. **REPLEVIN: Bills and Notes: Recovery of Note Discounted: Principal and Agent: Authority of Agent to Transfer Premium Note: Life Insurance.** An agent of plaintiff, an insurance company, took an application for life insurance and a note in which he was named as payee for the first premium, and executed a receipt for the note, containing an agreement that if the policy was not issued in sixty days after examination by the insurance company's physicians, the note would be returned on surrender of the receipt. The note was given on Saturday, and the agent left it with plaintiff until Monday, when he called for it, stating that he wished to negotiate it. He transferred it to defendant, a bank, and received credit for the amount. Plaintiff never accepted notes for premiums, and whenever an agent took a note, he was charged with the premium, and if the company received the note, it only held it as collateral for the premium. Defendant bank, when it bought the note, knew it had been given for an insurance premium. Owing to a change of management in plaintiff insurance company before the issuance of the policy, the risk was refused, and it then brought replevin against the bank to recover the note. *Held*, that the agent had the power to discount the note, and there being no evidence of fraud on his part, replevin would not lie to recover it.
2. ———: ———: ———: ———: ———: **Instructions.** In such a case, where the court instructed the jury to return a verdict for plaintiff if they found it was the owner of and entitled to possession of the note at its date and found from the evidence that defendant knew when it was discounted, or by ordinary care could have known, that the agent had no authority to discount it, or secondly, if the jury found defendant knew, or by ordinary care could have known, that the note was the property of plaintiff, and not that of the agent, or, thirdly, if the jury found the note was received by the agent as agent, and defendant knew, or by ordinary care could have known, he had no authority to indorse and discount it, the second charge was inconsistent with the third and all three were inconsistent with the evidence.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

REVERSED.

*Harry W. Hacussler and Rassieur & Feuerbacher*  
for appellant.

(1) The insurance company, not having issued a policy of insurance on the life of Edgar B. Woodward, had no such interest in the note herein sued for, as would entitle it to maintain replevin therefor. If the International Bank of St. Louis was not the bona fide owner for value, then the Woodward & Tiernan Printing Co. is entitled to possession of the note, and not the insurance company. Plaintiff in an action of replevin, cannot recover upon the weakness of defendant's title, but must prevail, if at all, upon the strength of its own title. *Bank v. Snyder*, 85 Mo. App. 82; *Kennedy v. Dodson*, 44 Mo. App. 550; *Moore v. Carr*, 65 Mo. App. 64; *Rhoades v. McNulty*, 52 Mo. App. 301; *Bank v. Water Power Co.*, 58 Mo. App. 532. (2) The receipt given by August Goerts to Edgar B. Woodward at the time of the execution and delivery of the note, should not have been admitted in evidence, as it was not shown that the International Bank of St. Louis, or the officers thereof, had any knowledge of such receipt or its contents at the time of the discounting of said note. *Hunter v. Johnson*, 119 Mo. App. 487; *Donovan v. Fox*, 121 Mo. 236; *Hamilton v. Marks*, 63 Mo. 167. (3) The mere fact that the note was made payable to "August Goerts, Agent," did not impart notice to the bank that said August Goerts was not the real owner thereof, or that he did not have authority to endorse or discount the note. *Bryant v. Durkee*, 9 Mo. 169; *Agricultural Works v. Heisser*, 51 Mo. 128; *Thornton v. Rankin*, 19 Mo. 193; *Nickerson v. Gilliam*, 29 Mo. 456; *Powell v. Morrison*, 35 Mo. 244; *Mayer v. Bank*, 86 Mo. App. 108; *Fletcher v. Schaumberg*, 41 Mo. 501; *Eyerman v. Bank*, 13 Mo. App. 289. (4) The rule that a purchaser of a note is not an innocent holder thereof if there are cir-



cumstances connected with the transfer of same, sufficient to put an ordinarily prudent man on inquiry, is not the prevailing law of this State; and to deprive the bank of the status of an innocent holder for value, it must be proven that the bank bought the note in bad faith, with knowledge of the fact that Goerts was not the rightful owner, or had no right to endorse or discount same. Merely proving facts such as would put an ordinarily prudent party about to purchase a note, upon inquiry, is not sufficient, nor is gross negligence. *Hamilton v. Marks*, 63 Mo. 167; *Bank v. Leeper*, 121 Mo. App. 688; *Wright Inv. Co. v. Realty Co.*, 178 Mo. 72; *Bank v. Bank*, 109 Mo. App. 665; *Lee v. Turner*, 89 Mo. 489; *Mayes v. Robinson*, 93 Mo. 114; *Jennings v. Todd*, 118 Mo. 296; *Bank v. Hammond*, 104 Mo. App. 403; *Inv. Co. v. Vette*, 142 Mo. 560; *Inv. Co. v. Fillingham*, 85 Mo. App. 534. (5) The insurance company required its agent, August Goerts, to return cash for the first premium on policies issued by it, and would not accept notes in payment of such first premiums, and should not now be heard to say that Goerts had no authority to endorse a particular note, to the injury, loss or damage of an innocent purchaser for value.

*A. A. Hunt and John O. Marshall* for respondent.

(1) This court cannot consider the question as to whether the court below erred in overruling the demurrer to the evidence, for the reason the evidence is not set out in full and the defendant below introduced further testimony in support of his defense. *Costello v. Fesler*, 80 Mo. App. 107; *Smith v. Sanders*, 70 Mo. App. 221. (2) The question as to the inadmissibility of evidence is waived by the failure of appellant to notice them in his brief. Nor were proper exceptions saved thereto. (3) The burden of proof was on the defendant to establish that it was a bona fide holder for value before maturity, when plaintiff had first shown

that fraud entered into negotiations of the note. *Johnson v. McMurry*, 72 Mo. 278; *Keim v. Vette*, 167 Mo. 390; *Henry v. Sneed*, 99 Mo. 407; *Hamilton v. Marks*, 63 Mo. 167; *Chapman v. Hoff*, 129 Mo. 317. (4) The word "agent" was sufficient to put defendant upon inquiry, and in law amounted to actual notice of infirmities of the note. *Ford v. Brown* (Tenn.), 1 L. R. A. (N. S.) 188. (5) The word "agent" limited negotiability of the note to the extent of agent's authority to indorse. (6) The verdict of the trial court is supported by the evidence. (7) The answer does not bring defendant within the rule protecting innocent holders of commercial paper. There is no allegation therein that it was an innocent holder, nor that the note was taken in usual course without the knowledge of infirmities. *Renshaw v. Wills*, 38 Mo. 201.

GOODE, J.—Action of replevin to recover possession of a negotiable promissory note, dated September 5, 1908, due January 5, 1909, for the sum of \$3506, payable to August Goerts, agent, and signed by the Woodward & Tiernan Printing Company. Said note is alleged to be of the value of its face, and plaintiff asks to recover it and one hundred dollars damages for its detention. Answer denied plaintiff was entitled to possession of the note at the filing of the petition or since, denied defendant ever wrongfully took the note from the possession of plaintiff or wrongfully detained it from plaintiff, and averred that long prior to the institution of the present action and before the maturity of the note, the payee endorsed, assigned and delivered it for a valuable consideration to defendant, whereby defendant became the owner. Plaintiff is engaged in the life insurance business in the city of St. Louis, and August Goerts, at the date of the note, was its agent and vice-president. He solicited risks, and in the course of that business induced Edward Woodward, president of the Woodward & Tiernan Printing Company, to take out a policy of

insurance. Woodward was a heavy man and classed as an "over-weight;" but plaintiff company insured that kind of risks. Goerts offered to sell Woodward a policy of the fifteen-years endowment variety, insuring him for \$50,000. During the negotiation, not only Goerts, the vice-president of plaintiff company, but Starnes, its president, saw Mr. Woodward and agreed to issue the policy; in fact Woodward applied for a policy of \$25,000, but Starnes offered to write one for \$50,000. Woodward submitted to an examination by physicians who acted for the company and was passed as a "first-class risk." Thereupon he executed the note in controversy for the first premium. Though the note was signed by the Woodward & Tiernan Printing Company, it was given for the accommodation of Edgar B. Woodward. On the same date Goerts executed a receipt to the Woodward & Tiernan Printing Company for the note, said receipt being also a contract which contained one term material to the present case, namely, if a policy was not issued to the applicant Woodward in sixty days after he had been examined by the company's physicians, the sum paid (*i. e.*, the note) would be returned on surrender of the receipt to the company. That instrument was admitted in evidence at the trial of the present case over the objection and exception of defendant, on the score that it knew nothing of the receipt having been given. The note was negotiated probably on September 7, 1908, to defendant, a banking institution in the city of St. Louis, which credited Goerts as agent, with the proceeds on the books of the bank and he checked the credit out in the regular course of business. Before a policy was issued to Woodward, a change in the management of the directory of plaintiff company occurred, Starnes ceasing to be president and Goerts vice-president and agent, and thereafter, in November, 1908, the company refused in writing to issue the policy. Meanwhile Woodward had been demanding his note back or the policy, and the company's refusal was made to him.

Afterward, on December 2, 1908, the present action was instituted to recover the note back from the bank. Other facts must be stated. The chief witness for plaintiff was Goerts, the payee of the note. He testified the insurance company refused to accept notes for premiums and whenever a soliciting agent took a note for the first premium, he was charged with the premium; that if the company received the note, it only held it as collateral for the debt, and the agent was charged with the amount. This was the uniform testimony on that issue. Agents were in the habit of taking notes for premiums and discounting them in banks, but the notes were regarded as the property of the agent and not of the insurance company, except as already stated, when occasionally the company held them as collateral until the obligation of the agent for the premium was paid in cash. Goerts had been accustomed to take premium notes, payable to him as agent, and to discount them with defendant and other banks. When defendant bought the note in controversy, it did not know what insurance company Goerts represented, but knew the note had been given for the premium on the insurance contract; and, in truth, inquired of Goerts about the origin of the note. Goerts had taken notes payable to him as agent, as the one in question was, and when he did not have "facilities for discounting them for several days, he gave them to the company, but did not receive credit for commission until the company had received the amount it had charged against him." When Goerts received the present note, he showed it to the officers of the insurance company, declaring he was proud of the application. The note was given on Saturday; we suppose, after banking hours. Anyhow, Goerts testified he could not discount it that day, and not wishing to carry it around with him, he left it with the officers until the next day (probably meaning Monday) telling them to take care of it for him. Afterwards he called for it, asking them "to give it to me to negotiate myself," as he testified.

They turned it over to him on his demand and he negotiated it with defendant. We find nothing in the record contradictory in any degree of the testimony of Goerts. The witnesses for defendant, among whom was the superintendent of agencies of plaintiff company, corroborated what Goerts said. The superintendent of agencies testified that if an agent brought in a note for a premium it would be simply an act of courtesy on the part of the company to accept and hold it until such time as the cash was paid for the premium; that the company looked to the agent for the net cash, did not accept notes as premiums, but only held them as collateral; that the company advised agents to handle their own paper and not to bring it into the office at all, and agents were not authorized to take a note payable to the company for the first premium. Such, in substance, are the material facts. In our opinion their only result is to defeat plaintiff's action. This case is governed less, perhaps, by the law merchant, than by the law of principal and agent. It is an ordinary action of replevin for a piece of personal property. If any wrong occurred in connection with the note, the wrong was the negotiation of the note by Goerts before the policy had been issued. We do not say he committed any wrong in that respect, because, as far as appears, the only reason the policy was not issued was a change in the management of the company, and in everything Goerts did about agreeing to take the risk he had the approval of the management in charge at the time. The risk had been passed as first-class, and there is nothing to show Goerts had reason to believe the policy would be refused. However, at the most, the insurance company, after declining to issue the policy, had a claim against Goerts for the proceeds of the note, as a receipt had been given by him, or an agreement in the form of a receipt, which declared the note would be returned to Woodward if the policy was not written. What is clear on the facts before us is, that Goerts had the power to discount this note—to ne-

gotiate it to defendant bank. Even granting the title to it was in plaintiff, the uncontradicted evidence shows plaintiff's officers, after it had been turned over to them by Goerts for safe keeping, redelivered it to him on his demand and did so in order to enable him to negotiate it. That is, the officers of the company turned it back to Goerts for the express purpose of negotiating it. This being so, we can conceive of no contingency in which the title of defendant could be defeated unless its officers were aware of some fraudulent motive on the part of Goerts. Suffice to say there is no proof he had any fraudulent motive, nor a shadow of evidence tending to prove defendant was in collusion with him or acted in bad faith. Two sections (55, 56) of the Negotiable Instrument Act bear on the infirmities in the title of holders of negotiable paper and notice of such infirmities. [1 Mo. Ann. St., p. 530.] The first says a title of a person who negotiates an instrument is defective when he obtained the instrument or any signature by fraud, duress, force and fear, or other unlawful means, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud. Only the latter clause could apply to the negotiation of the note in dispute by Goerts, and how can he be said to have breached faith or committed a fraud, when he did with the note what the officers of plaintiff intended he should do when they redelivered it to him?

The case was submitted to the jury in the court below on instructions which authorized them to return a verdict for plaintiff if they found it was the owner of and entitled to the possession of the note at its date, and found from the evidence defendant knew when it was discounted, or by ordinary care could have known, August Goerts had no authority to discount it; or, secondly, if the jury found defendant knew, or by ordinary care could have known, the note was the property of plaintiff and not the property of Goerts; or, thirdly, if the jury found the note was received by Goerts as

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agent and defendant knew, or by ordinary care could have known, he had no authority to indorse and discount it. The second charge was inconsistent with the third and all three were inconsistent with the evidence in the case; for, as said, both by custom and, in the present case, by special conduct equivalent to express authority, Goerts was authorized to discount the note. As plaintiff's officers had accepted the risk and had turned the note over to Goerts to negotiate it, defendant could have learned nothing against Goerts' right to dispose of the paper by any degree of diligence in prosecuting inquiries.

The judgment is reversed. All concur.

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**SAMUEL S. THORPE**, Defendant in Error, v.  
**CHARLES F. WEISMANN**, Executor of the  
Estate of **JOHN C. HUBINGER**, Deceased, Plain-  
tiff in Error.

St. Louis Court of Appeals. Argued and Submitted May 4, 1910.  
Opinion Filed May 17, 1910.

1. **APPELLATE PRACTICE: Revivor: Foreign Executor: Statute.**  
Where plaintiff in error died, the action could not be revived in the name of his personal representative, a foreign executor, under Laws 1905, page 95, where there was no showing that the laws of the state where deceased died, nor those of the state where the cause of action accrued, authorized such executor to prosecute the action in his name.
2. ———: **Appeal from Order Overruling Motion to Tax Costs: Necessity of Bill of Exceptions.** Where a bill of exceptions is not filed, exceptions to the action of the trial court in overruling a motion to tax costs are not before the appellate court for review, and the presumption always being in favor of the regularity and correctness of the action of the trial court, its judgment will be affirmed.

Error to Clark Circuit Court.—*Hon Chas. D.*  
*Stewart*, Judge,

AFFIRMED.

*W. C. Howell and J. S. Tull* for plaintiff in error.

*W. L. Berkheimer and W. J. Roberts* for defendant in error.

REYNOLDS, P. J.—Samuel S. Thorpe, plaintiff below, brought suit against the original defendant, John C. Hubinger, hereafter referred to as defendant, on a certain promissory note, suing out an attachment in aid thereof, under which a certain telephone line in Clark county, this State, was attached as the property of the defendant, he being a non-resident of this State. A receiver was appointed to take charge of the telephone line. Subsequently the suit was dismissed, the attachment being dissolved, and the parties entering into a stipulation, which appears to have been approved by the court and entered up as a judgment in the case. Under this it was adjudged that the plaintiff's petition be dismissed without prejudice, "plaintiff to pay all costs of suit, including the receiver's charges and expenses." Reciting other matters not now material, the judgment concludes with the clause, "defendant's counterclaim is hereby dismissed, the costs, if any, for filing same to be paid by the defendant." Afterwards the defendant filed a motion to tax costs as follows: \$134.30 against plaintiff, itemizing it, and \$104.51 against defendant, itemizing it. The court, as appears by record entry, on consideration of this motion to tax costs, "having heard the motion and argument of counsel and being duly advised in the premises, finds that the plaintiff has paid all costs taxable to him," enumerating them in a total of \$289.15, and adjudges "that all other costs shall be taxed to the defendant. The motion is therefore overruled in so far as it asks for further taxation against the plaintiff." Following this is the notation "to which action of the court in overruling said motion to tax



costs, the defendant did then and there at the time except." Following this is the statement that it is "all the record in the case." Defendant sued out a writ of error from this court, directed to the circuit court of Clark county, and having duly served the writ, brought the case here. On motion this court dismissed the writ of error for failure to prosecute, but the death of the defendant below being suggested and it being suggested that one Weismann had been appointed executor of the estate of the defendant by the proper court in the state of Iowa, of which state he was a citizen and resident and where he died, the order of dismissal was set aside and citation issued for revival in the name of the executor. The executor voluntarily appeared, and is now here prosecuting the writ.

It is insisted by the learned counsel for the defendant in error that a foreign executor has no standing in the courts of this State and that the action was improperly revived in the name of the foreign executor and that the writ of error should be dismissed. Counsel for the executor relies upon section 548, Revised Statutes 1899, as that section was amended by the Act of April 12, 1905 (see Acts, 1905, p. 95). That section as amended provides that "whenever any cause of action has accrued under or by virtue of the laws of any other state or territory, and the person or persons entitled to the benefit of such cause of action are not authorized by the laws of such state or territory to prosecute such action in his, her, or their own names, then, in every such case, such cause of action may be brought and prosecuted in any court of this State by the person or persons authorized under the laws of such state or territory to sue in such cases. Such writs may be brought and maintained by the executor, administrator, guardian, guardian *ad litem*, or any other person empowered by the laws of such state or territory to sue

in a representative capacity." We do not think this section, as amended, meets this case. It is true that the note sued on is dated at Minneapolis, Minn., and is there payable. It may be said that the cause of action accrued in the state of Minnesota. We are not informed of the laws of the state of Iowa, where the defendant died, or of those of Minnesota covering the right of action resting in the executor of a defendant in case of the death of the original party, nor whether the executor is authorized by the laws of those states to prosecute the action in his, her, or their own names. If we are to assume that the laws of Iowa or Minnesota are as those of our own State, there would be no question whatever of the right of the executor to maintain this action as executor. Assuming the right of action, however, to be the right to sue out a writ of error, that right originated in this State and not in either Iowa or Minnesota and the section of the statute referred to has no application. It is not, however, necessary to determine this proposition in this case, for the reason that no bill of exceptions having been filed in the case, no exceptions to the action of the court in overruling the motion are before us for review. Even a motion for new trial does not appear to have been filed. While it is true that the stipulation for the dismissal of the case provides that all the taxable costs in the suit are to be paid by plaintiff and that the defendant is to be chargeable only with the costs attendant on and connected with the assertion of the counterclaims which he interposed, we are without any information whatever, by bill of exception, record or otherwise outside of the statement of the defendant himself in his motion, as to what those costs were, and beyond those specified in the order of the court in overruling the motion. For anything that appears in the record, the court has allowed all of the costs contemplated by the agreement as properly taxable against the plaintiff, and the costs which defendant claims he has paid, for anything that is shown

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Flooring Co. v. Knost.

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to the contrary, may be the costs connected with the assertion of the counterclaim. There is, therefore, nothing before us in this record by which we can determine that the action of the lower court was reversible error, and the presumption always being in favor of the regularity and correctness of the action of that court, we can do nothing but dismiss this writ of error, which is accordingly done and judgment of circuit court affirmed. All concur.

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**ST. LOUIS MAPLE & OAK FLOORING COMPANY,**  
Respondent, v. **W. C. KNOST,** Appellant.

**St. Louis Court of Appeals. Argued and Submitted May 3, 1910.**  
**Opinion Filed May 17, 1910.**

1. **SALES: Instructions: Refusal: Issues Ignored.** In a suit against an individual on account of goods sold to a company, an instruction that plaintiff could not recover if it was agreed between plaintiffs and defendant's agents that the sale was to the company was properly refused, as ignoring the real issue whether defendant promised to pay for the goods.
2. ———: **Sale to Corporation: Liability of Agent.** That part of the goods was delivered to the company before defendant agreed to pay therefor did not release him from liability for the part delivered afterwards.
3. **CONTRACTS: Telephone Conversation.** A valid contract can be made by telephone conversation.
4. **SALES: Instructions: Modification: Failure to Define "Binding Contract."** In a suit against an individual on an account for goods sold a company, an instruction basing the recovery on a "binding contract" to buy was properly modified so as to base the recovery on plaintiff's reliance on a mutual agreement between plaintiff and defendant that if plaintiff would sell the goods defendant would pay for them. It would have been error to have told the jury they must find there was "a binding contract," without defining that term.

**Appeal from St. Louis City Circuit Court.—Hon. Virgil**  
**Rule, Judge.**

**AFFIRMED.**

*E. N. Robinson and S. C. Rogers for appellant.*

(1) The court erred in overruling the defendant's demurrer to the evidence. (a) Because there was no proof of delivery of any specific amount of the flooring. (b) Because there was no proof of a specific price or of the reasonable value of the goods delivered. Such proof is essential or the judgment will be reversed. *Rose v. Rubeling*, 24 Mo. App. 369; *Siegel v. Howard*, 13 Mo. App. 588; *Rottmann v. Pohlmann*, 28 Mo. App. 399. (2) The court erred in admitting improper evidence at the request of the plaintiff. The court should not have permitted witnesses and counsel to refer to and read from or exhibit to the jury the card exhibit 1, and the invoices exhibits 2, 3, 4, 5, and 6, and the leaf from the ledger until delivery, agreed price, or reasonable value had been shown and until the dray tickets were produced or accounted for, since being made in the absence of defendant they were purely self serving and highly prejudicial. The dray tickets being in the possession of plaintiff and they being important to sustain its case, and not producing them, the presumption is against it. *Morrow v. Railroad*, 123 S. W. 1034. (3) The court erred in admitting plaintiff's exhibit 1 and in permitting same to be inspected by the jury. It was a card made for purely self-serving purposes, and does not correctly contain the amount of lumber alleged to have been delivered, as testified to by witness Smith, nor does it contain all of the arrangements so testified to by Smith. (4) The court erred in admitting plaintiff's exhibits 2, 3, 4, 5 and 6 and 7. Exhibits 2, 3, 4, 5 and 6 were called invoices which plaintiff failed to show were shown to defendant or that defendant had any knowledge of with the single exception of 2, which Smith claims to have given defendant. Exhibit 7 purports to be a page from defendant's records. It should not have been admitted without the production of the holder and other sheets

claimed to have been so kept, that the defendant and the jury might compare and the jury pass on such fact. *Drug Co. v. Grady*, 57 Mo. App. 41. (5) The court erred in giving an improper instruction at the request of the plaintiff. Instruction No. 1 erroneously assumes that all the flooring sued for was delivered and assumes the price was either agreed on or reasonable without requiring the jury to find such as a fact, and in the latter part contradicts the former by requiring the jury to return a verdict for the balance unpaid, if any, thereby assuming there was at some time an amount due by defendant. (6) The court erred in refusing instructions offered by defendant. Instructions 1a and 2a correctly stated the law as shown by the evidence. Defendant's testimony was to the effect the flooring was for the Palace Amusement Company, and instruction 1a should have been given. Then, unless there was a meeting of the minds of the parties, an agreement to sell and deliver on the one part and an agreement to receive and pay for on the other, plaintiff could not recover, hence instruction 2a should have been given. By refusing to give each of them the theory of defendant's defense was not submitted to the jury and is fatal error. *Galbreath v. Carnes*, 91 Mo. App. 512; *Shoe Co. v. Hilig*, 70 Mo. App. 301; *Link v. Westerman*, 80 Mo. App. 592; *Standfield v. Loan Assn.*, 53 Mo. App. 595; *Evers v. Shumaker*, 57 Mo. App. 454. (7) The court erred in modifying instruction offered by defendant. The instruction offered by defendant, 4a, while, possibly, not devoid of criticism, still it was error to so change it in its entirety and give it as it was given (No. 4), so that it was but a repetition of the only other instruction (No. 1) given in the case. (8) The court erred in overruling defendant's motion for a new trial; while this cause originated in a justice court on simple statement filed, the proof necessary is the same as if the cause had been filed in the circuit court with a petition containing necessary allegations; that is, first: That there was a contract at a

stated price; or, second: Assumpsit and the flooring was delivered and the price charged reasonable. These facts are absolutely essential to a recovery by plaintiff, but there was no such proof, hence there was a total failure of proof. R. S. 1899, sec. 798.

*Albert M. Brown* for respondent.

(1) Where a corporation making a contract of its own, which therefore, had been entered into by its promoters in its name, and before it came into being, the promoters are not thereby relieved from the burden of their own contract. *Furniture Co. v. Crawford*, 127 Mo. 356; *Hunt v. Salisbury*, 55 Mo. 312; *Richardson v. Pitts*, 71 Mo. 128; *Smith v. Warden*, 86 Mo. 399. (2) Mere insufficiency of the evidence, in the opinion of the appellate court, is not sufficient to justify reversal. *Steube v. Iron & Foundry Co.*, 85 Mo. App. 640. (3) A party on appeal must stand or fall by the theory on which he tried and submitted his case. *Walker v. Owen*, 79 Mo. 563. (4) Issues not raised in the trial court will not be considered on appeal. *Tomlison v. Ellison*, 104 Mo. 105; *Hollman v. Lange*, 143 Mo. 100. An objection that there was insufficient proof of a material fact cannot be first made on appeal. *Ringo v. Railroad*, 91 Mo. 667; *McCoy et al. v. Farmer et al.*, 65 Mo. 244. Instructions to the jury should not be broader than the issues raised by the pleadings and evidence. *Bender v. Dunigan*, 99 Mo. 126.

REYNOLDS, P. J.—This action was commenced before a justice of the peace, by filing an account against the defendant in which the balance claimed was \$259.83 for lumber alleged to have been furnished and delivered to a corporation called the Palace Amusement Company, by the order and on the credit of the defendant. From a judgment against him in the justice's court, defendant appealed to the circuit court where the case was tried

before the court and a jury. There was evidence in the case tending to show that before the agreement to make the sale or before any of the lumber had been delivered, the manager of the plaintiff called up the defendant on the telephone and was told by him that he would personally pay for the lumber, the whole bill to amount to \$459.83, and that on the strength of this promise and after plaintiff had satisfied itself of the financial responsibility of the defendant, the lumber was delivered at the place in St. Louis at which the Palace Amusement Company was erecting a skating rink, that being the superstructure into which the material went, the defendant being connected with that company. The Palace Amusement Company does not appear to have been organized as a corporation at the time the material was purchased. There was also evidence tending to prove that the lumber was of the value charged for, that being the agreed price, and that two hundred dollars had been paid on the account, leaving a balance of \$259.83, the first payment on the two hundred dollars being made by personal check of the defendant for the sum of one hundred dollars. The manager of the plaintiff testified that he had personally seen to the delivery of the lumber at the lot and that dray tickets had been taken for each load. The dray tickets, however, were not produced at the trial.

On the part of the defendant there was testimony given by him to the effect that a conversation between himself and the manager of the plaintiff, at the inception of the transaction, had taken place over the telephone, and that he had given references to the manager of plaintiff as to his credit and standing, but he denied having, in that conversation, or at any time, personally undertaken to pay the bill, explaining that the one hundred dollars which he had paid by his own check was money in his hands which had been paid to him on account of the Palace Amusement Company by one of the organizers of that concern, but as it was not then organized no

bank account had been opened in its name. Briefly, there was evidence on part of plaintiff tending to prove that the lumber had been furnished; that the bill for it was correct; that it had been furnished on the credit and order of the defendant. On the part of defendant there was evidence directly contradicting all this matter, except as to the correctness of the bill and although defendant did not claim the lumber had not been delivered, it stood on its demand that plaintiff should prove its account and that the best proof of delivery was the dray tickets, which were not produced. It may be said in passing that no demand or notice for the production of these tickets appears to have been made or given prior to the trial in the circuit court; nor were they demanded or produced at the trial before the justice. So that while defendant stood on its claim that the dray tickets should be produced in support of the claim of lumber delivered, there was no testimony to show that the lumber charged for had not been delivered at the place at which the rink was being erected. Various letters, correspondence between the parties, and carbon copies, duplicates of account, were offered and introduced in evidence and admitted over the objection and exception of the defendant, as not the best evidence and as not binding on defendant.

At the conclusion of the trial the court gave an instruction to the jury to the effect that if they found from the evidence that it was the mutual understanding between plaintiff and defendant, that defendant purchased and agreed to pay for the flooring which is in question in the case and that the defendant had not paid to the plaintiff all the purchase price and that the plaintiff had delivered the flooring upon the faith of defendant's promise to pay therefor, if he did so promise, then the jury should return a verdict for the plaintiff in such sum as they should find remains due and unpaid, if any, not exceeding the sum of \$259.83. At the conclusion of the plaintiff's case in chief and of the testimony



in the case, defendant offered instructions in the nature of a demurrer to the evidence which were refused, defendant duly saving exception. There were three instructions asked by the defendant which were refused by the court. One was to the effect that if the jury found from the evidence that the plaintiff sold the bill of goods to one W. H. Ashton or to Ashton acting for the Palace Amusement Company and that in the conversations with Ashton, plaintiff's agent was informed of an intent to form a corporation and it was agreed between said agent and W. H. Ashton that the lumber was to be sold to the Palace Amusement Company, then plaintiff cannot recover. The second instruction asked and refused was to the effect that unless the jury believed and found from the evidence that defendant contracted and agreed to pay for the goods sued for herein prior to the delivery of any part of the same, then plaintiff cannot recover and your verdict will be for the defendant. The third instruction asked was to the effect that the alleged conversation between defendant and the agent of plaintiff over the telephone did not constitute a contract for the purchase of the goods sued for. These were all refused and exceptions saved. The defendant further asked an instruction (No. 4), to the effect that before the plaintiff could recover it must show by a preponderance of the testimony that "a binding contract was made herein with defendant for the purchase of the lumber sued for," and unless the jury found that plaintiff has established said contract by a preponderance or greater weight of evidence, the verdict in the case will be for defendant. The court refused to give this instruction as asked, making the instruction read, after telling the jury that before plaintiff could recover it must show by a preponderance of the testimony that "it was mutually agreed between plaintiff and defendant that if plaintiff would sell and deliver the lumber here sued for, that defendant would pay for the same, and that plaintiff delivered said lumber to de-

fendant upon the faith of such promise," and substituted for the words "said contract," the words, "such contract." The words in quotation last above being substituted for the words first quoted in this instruction No. 4. Defendant excepted to the alteration of the instruction and to the giving of it as altered.

There was a verdict in favor of plaintiff for the amount sued for and after interposing a motion for new trial, which was overruled and exceptions saved, defendant has duly perfected an appeal to this court.

The errors assigned are to the overruling of the defendant's demurrers to the evidence, the admission of improper evidence on part of plaintiff, the giving of improper instructions, the refusal of the instructions asked and the modification of the instruction asked and the overruling of the motion for new trial.

We do not think there was any error in the refusal of the instructions or in the modification of instruction No. 4. The first and second instructions were incorrect. The first instruction asked and refused was particularly objectionable in that it left out of consideration the real issue, that is to say, that independent of any arrangement between the plaintiff and Ashton, as agent of the Palace Amusement Company, it omitted all possible assumption of liability and promise to pay it before delivery of any of the goods on the part of defendant. *Non constat* that because plaintiff may have looked to the Amusement Company to pay, it had released defendant. The second instruction was properly refused because it stated an incorrect proposition of law in that it rendered it necessary for the recovery of plaintiff as against this defendant, that defendant had not agreed to pay for the lumber or goods sued for prior to delivery of any part of them. That was not correct. It might have been true that part of the lumber had been delivered before defendant promised, if the defendant promised to pay before the delivery of the balance, he certainly was liable for that part there

after delivered. This feature was not covered by this instruction. The third instruction is to the effect that the conversation over the telephone did not constitute a valid contract. If by this is meant that a contract cannot be made by telephone conversation, it is too late to so argue. A large part of our business transactions are, in this century, carried on by telephone. Our courts have long ago held that contracts made by telephone are as effective and binding in law as if made verbally between parties standing face to face and carrying on the conversation which culminates in the contract. No question is made as to the identity of the parties conversing. If this conversation was as testified to by plaintiff's agent, it made a valid contract between the parties. The alteration that the court made in the fourth instruction was entirely correct. As asked, that instruction gave the jury no guide as to what would constitute "a binding contract." As changed by the court, the jury were properly directed as to what would constitute a binding contract. It was the province of the court to instruct the jury as to what facts they should find in arriving at the question of what would constitute a contract. To tell them they must find "a binding contract," without defining what constituted a binding contract would be error. The demurrer to the evidence as a whole was correctly overruled.

While the evidence was conflicting, it was positive on the part of the plaintiff to the effect that the material had been delivered to the Palace Amusement Company on the express personal promise of the defendant to pay for it individually. There was positive testimony that the material had all been delivered, so that the fact of delivery was in evidence before the jury, independent of the production of dray tickets. It was then for the jury to determine, under proper instructions, on the credibility of the witnesses and the facts in evidence, and the weight to be given to the testimony,

the ultimate facts. We see no error in the admission of testimony or on the whole record, and the judgment of the circuit court is affirmed. All concur.

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**WILEY B. SMITH, Respondent, v. UNION ELECTRIC LIGHT & POWER COMPANY, Appellant.**

**St. Louis Court of Appeals. Argued and Submitted March 16, 1910.  
Opinion Filed May 17, 1910.**

1. **MASTER AND SERVANT: Negligence: Injury to Servant: Defective Scaffold: Instructions: Assuming Facts.** In an action by a servant against the master for personal injuries received by the former, due to the breaking of a plank on a scaffold, on which he was working, an instruction which assumed defendant had provided and furnished the plank for use on the scaffold was erroneous as assuming that fact in the absence of any evidence to justify it.
2. ———: ———: ———: **Defective Appliances: Liability of Master.** The master is liable for injury to a servant only when either actual knowledge of the defective tool or appliance causing the injury is brought home to him, or such facts are in evidence as warrant the jury in assuming he has or should have such knowledge.
3. ———: ———: ———: **Defective Scaffold: Master's Negligence not Shown: Facts Stated.** A steamfitter gang, of which plaintiff was a member, in the employ of defendant in the construction of a coal tower, was told by defendant's foreman to mount a certain scaffold, on which there was a platform consisting of six planks, and run some pipes, and when they finished there to go to another scaffold and run some pipes there. The steamfitters on going to the second scaffold and finding no platform on it, told the carpenters, who had already carried away four of the six planks from the first platform, to leave the other two. The steamfitters, in the absence of the foreman, without any direction having been given them as to what planks they should take or where they should get them, used these two planks, though there was plenty of material on the floor below that on which they were working, for the platform of the second scaffold, and one of the planks, which was cross-grained and contained a knot, broke when the plaintiff stepped on it. *Held*, there was no evidence that defendant furnished these particular planks to the steamfitters with which to build a platform on the

second scaffold, and that plaintiff, without directions from defendant, having selected the defective plank, and knowledge of the defect not being brought home to defendant, plaintiff was not entitled to recover.

4. ———: ———: ———: ———: **Contributory Negligence.** It being further shown that plaintiff selected the plank and used it without any examination as to its condition and that a slight inspection on his part would have shown him it was unsafe, it is held that his injuries were caused by his own carelessness.

**On Motion for Rehearing.**

5. ———: ———: ———: ———: ———. The first scaffold, from which the planks were taken, having three supports to rest upon, one of which was in the middle of the plank, and the second scaffold, on which the plank rested when it broke, having only two supports, one at either end of the plank, and none under the middle, it cannot be inferred that because the plank had been safely used on the one scaffold plaintiff was warranted in using it on the other, since, when it broke, plaintiff was standing near the middle of it, where there was the most strain and least support, whereas, on the other scaffold, it had been supported in the middle by a joist.

**Dissenting Opinion by Norton, J.**

6. ———: ———: ———: ———: **Master's Negligence Question for Jury.** The direction of defendant's foreman to plaintiff and his companion steamfitter to use the standing scaffolds in performing their task of fitting steam pipes was an assurance by the master that they were reasonably safe for the purpose intended and that the boards on top of them, on which the servants were to stand and walk, were reasonably safe for that purpose, although the scaffold on which plaintiff was injured was not pointed out by the foreman—the board which broke, however, having been in use on the scaffold which was pointed out and removed by plaintiff to the scaffold on which he received his injury; and hence it was for the jury to determine whether or not defendant was liable.
7. ———: ———: ———: ———: **Contributory Negligence Question for Jury.** Others having used the plank in the scaffold, an ordinarily prudent person would not have scanned it for defects as closely as he would on selecting it in the first instance, and it being rough on one side and discolored by use on the other so that the knot which occasioned its breaking was concealed and hence not likely to be discovered upon such an inspection as an ordinarily prudent workman would have made under the circumstances, plaintiff should not be adjudged guilty of contributory negligence as a matter of law.

Appeal from St. Louis City Circuit Court.—*Hon. Moses N. Sale*, Judge.

REVERSED.

*Seddon & Holland* for appellant.

The court erred in refusing to give, at the close of all the testimony, the instruction in the nature of a demurrer to the evidence offered by defendant and refused by the court. *Bowen v. Railroad*, 95 Mo. 277; *Herbert v. Ferry Co.*, 107 Mo. App. 287; *Forbes v. Dunnavant*, 198 Mo. 193; *McGinnity v. Reservoir Co.*, 155 Mass. 183; *O'Connor v. Rich*, 164 Mass. 560; *Adasken v. Gilbert*, 15 Am. Neg. Rep. 594; *Johnson v. Towboat Co.*, 135 Mass. 290; *Miller v. Railroad*, 175 Mass. 363; *Colton v. Richards*, 123 Mass. 484; *Kelly v. Norcross*, 120 Mass. 508; *Allen v. Iron Co.*, 160 Mass. 557; *Dewey v. Parke, Davis & Co.*, 76 Mich. 631; *Hoar v. Merritt*, 62 Mass. 386; *Beesley v. Wheler & Co.*, 103 Mich. 196; *Cregan v. Marston*, 126 N. Y. 568; *Pfeiffer v. Dialogue*, 8 Am. Neg. Rep. 90; *Hayes v. Railroad*, 17 Am. Neg. Rep. 544; *Callahan v. Trustee*, 180 Mass. 183.

*Earl M. Pirkey* for respondent.

(1) "If the master undertakes to furnish structures to be used by the servant in the performance of his work, the master must use due care in the erection of the structures, and, if there is negligence on his part, or negligence on the part of some one representing him in that respect, he is liable for injuries sustained by the servant." *Bowen v. Railroad*, 95 Mo. 277; *Combs v. Construction Co.*, 205 Mo. 367; *Kennedy v. Gas Light Co.*, 215 Mo. 704, where it is said: "When the preparation of the appliances is neither entrusted to nor assumed by them, the master may be held guilty of negligence, if defective appliances are furnished, even though the workmen themselves are employed in the

preparation of them." 26 Cyclopaedia of Law and Proc., p. 1115; Doyle v. Trust Co., 140 Mo. 1. (2) There is no obligation resting on the servant to inspect a scaffold furnished for his use by the master. 2 Labatt on Master and Servant, p. 1145, par. 410. (3) Where the appellant assigns for error the action of the trial court in refusing a demurrer to plaintiff's evidence he must set out the whole evidence in *haec verba* in his abstract or the appellate court will not consider the assignment. Nash v. Brick Co., 109 Mo. App. 600.

STATEMENT.—Respondent in his petition on which the case went to trial states that he was in the employ of appellant as a steamfitter's helper at work on a coal tower which defendant was erecting in the city of St. Louis. That he was at work in one of the apartments of the coal tower, engaged in running or placing pipes some distance above the floor of the apartment, and was working on a scaffolding covered with planks. That this scaffolding was in a defective and dangerous and not reasonably safe condition for plaintiff to work on or to use in doing his work by reason of one of the planks being at the time in a defective, dangerous and not reasonably safe condition for use in the platform; was unsound, weak and not of sufficient strength to bear the weight incident to its ordinary and reasonable use in the platform or to bear the weight of plaintiff when using the platform, it having knots in it and cut across the grain. That defendant knew or by the exercise of ordinary care could have known of the defect in the plank and of its dangerous character in time to have remedied the unsafe condition of the platform, but negligently failed to do so and negligently furnished it to plaintiff to work upon. That while plaintiff was at work on the platform and in the exercise of due care and without knowledge of the defect in the plank, it broke under plaintiff's weight and he fell and was injured, to his damage, etc.

The answer was a general denial and plea of contributory negligence of plaintiff in selecting and using the plank.

The reply was a general denial.

At a trial before the court and a jury there was testimony for plaintiff tending to prove the following facts: That on January 24, 1908, defendant was in possession and control of a plant at the foot of Ashley street, in the city of St. Louis. Adjoining this building was a coal tower, which it was erecting and which was completed in a general way so far as the outside structure was concerned, and defendant was engaged in finishing the inside parts; plaintiff was a steamfitter's helper in the service of defendant; in one of the rooms of this coal tower there was a contrivance, known as a chute or hopper, which came through the ceiling at about the middle of the room and extended from the ceiling a few feet toward the floor, but did not reach to the floor; on January 24, 1908, the day of the injury, there was a scaffold on the west side of this hopper and within reach of the ceiling, this scaffold was composed of three timbers at about an equal distance apart running east and west and supported from beneath, and on those timbers in a north and south direction were laid planks or boards, composing the platform of the scaffold, these boards were from twelve to fourteen feet long, six inches wide and two inches thick. South of the hopper were two supports at about the height of this scaffold and from six to nine feet apart. The boards on the scaffold were loose, as they were on all scaffolds that had been used while plaintiff was in the service of defendant, which was about eighteen months, and during such time it was customary for the men using the scaffold to shift the planks of the platform to such position as their work required, shifting from one scaffold to another. Plaintiff was a helper, working with a steamfitter named Gallagher and with another helper named Altman. The three were under a foreman named Saffley,



who in turn was under a superior named Tenney. On the day of the injury, Tenney directed this steamfitter gang to mount the scaffold west of the hopper and run some pipes and also directed them when that was done to run a line of pipes south of the hopper. Saffley also directed the same and supervised the steamfitting work while it was going on, but was not present when the boards were put on the scaffolding by plaintiff and his fellow-fitters nor when plaintiff fell and was injured, nor had he, Tenney, or any other superior, given any directions in connection with the selection or placing of the boards on the scaffold. That was left to the steamfitters gang, composed of Gallagher, and plaintiff and Altman. Pursuant to these orders, Gallagher and the two helpers mounted the scaffold west of the hopper, ran the pipe line directed, then having finished this and left that scaffold, prepared to run the pipe line south of the hopper. To run this it was necessary to work from a scaffold which was there in place, but without any platform or boards on it. It was about the noon hour when the pipe line on the west was finished by these fitters. The carpenters who built the scaffold on the west side, supposing the steamfitters were through with it, and intending to take the boards which made its platform for use elsewhere, started to remove the boards composing this platform of the west scaffold. The platform was composed of six boards. When the carpenters were in the act of removing them and had carried off four of them, Gallagher told them that he was not through running pipe and to leave two boards for them.

The foregoing is in the main taken from the statement of counsel for respondent. Referring to the abstract of plaintiff's own testimony as contained in the additional abstract furnished by his counsel, it appears that the carpenters left or turned over to the fitters two planks, whereupon plaintiff and Altman took these

two planks which had been on this west scaffold and carried them around and put them on the top of the scaffold on the south side of the chute. One of the carpenters who had been working there took them off of the scaffold and gave them to these pipefitters. Plaintiff was up on the scaffolding and Altman and Gallagher handed the planks up to him. Plaintiff laid the planks, putting down one while Altman, the other helper, put the other end of the plank in position. Altman and Gallagher handed the plank up to plaintiff who took hold of it and put it in position, first putting up one and then the other. Plaintiff testified that he did not see anything wrong with either of the planks that Gallagher handed to him; they appeared all right to him and he supposed they would to anybody. After laying the plank on the scaffold he stepped out on it and it broke, throwing him to the floor below. The plank was about fourteen feet long and it broke close to the middle and while plaintiff said he could see to the middle of it very well, while he was handling it and putting it in position, he did not notice anything wrong with it, just gave it a passing glance; knew that it was important to have a strong plank as they were going to stand on it but paid no attention to see whether it was strong or not, just supposed it was all right. Up to the time it broke it had looked all right. After it broke he noticed the knot in it which was nearly halfway across the 2x6 width of the plank; it went clear through the timber; had also noticed that this plank was cross-grained, noticed that after the accident. If he had looked for the knot or cross-grain before the accident and looked close he could have seen both; could see it better from the smooth side which was under than from the rough side which was on top, although the smooth side was covered with cement. One of the carpenters came and took away four of the six planks that had been left on the scaffolding at which plaintiff and the fitters had been working before lunch. (That is the west scaffold). He came

back to get the other two and Gallagher said, "Leave those two there. We want to put the pipe up here." The carpenters had intended to take them all somewhere else. They had these two planks in their hands carrying them away and when Gallagher asked them to let him use them they turned them over to him and he, plaintiff, and Gallagher and Altman put them in position on the south platform. There was a good deal of plank and timber around the building at that time, quite a number of these two-inch thick and six-inch wide and twelve or fourteen feet long planks in different parts of the building, but most of them were down stairs, about sixty or seventy feet from where plaintiff was and where they were putting the planks on the scaffolding; if he had noticed the knot in the plank and the cross-grain and considered it dangerous, could easily have got some other plank within a short distance, sixty feet, by drawing them up with a rope, that is, they were on the floor below where plaintiff was at work. The carpenters employed about the building had built all of the scaffolds and all the frame work and then the different men that came along, iron workers or pipefitters, would move the planks about to suit themselves. Plaintiff and the two pipefitters with him had frequently moved the planks from one scaffolding to another; these six planks that had been on the west scaffolding had been left there by the carpenters who had been doing some carpenter work. When plaintiff and his fellow pipefitters on the occasions referred to moved the planks about and put the planks on the scaffolding, they would get them off of one platform and move them around to another one; had never noticed any of the planks to be bad on the scaffolding when they were moving them but if they had wanted to and had seen one of them bad he supposed that they could easily have got a good one somewhere else; there were always more planks than they actually used; they had six planks on the scaffold west of the hopper and if one of them had been bad they could

have taken it off and stood it on top of another and if they were moving two away from the six to use on the south side they could pick out two good ones. He repeated that Mr. Saffley or Mr. Tenney were not around when he got hurt. Tenney was the overseer of all the construction of the steam work and laid out the work; he was foreman of the steamfitters and Saffley was his assistant. This crew of pipefitters had done pipefitting on the west side a day or two before, working at it from the platform on the west side of the chute and during that day had used the six planks which formed the platform of that scaffold; had not noticed anything wrong with any of these planks and they took two of those from the carpenters to use on the south scaffold when ready to work there. So much is the substance of plaintiff's own testimony now material to quote. Resuming the testimony as set out by plaintiff's counsel, the planks were of yellow pine, about twelve or fourteen feet long, six inches wide and two inches thick. There was evidence that a board of the dimensions of the board in question would be sufficient if of sound and good lumber to carry the weight of plaintiff even if placed on supports farther apart than those on which the board was resting when it broke. Plaintiff testified that he was not a carpenter and never worked in timber and knew nothing about timber. The scaffold west of the hopper was built by the carpenters and plaintiff was directed, as above mentioned, to use it and then run the pipe line south of the hopper, and it had been the custom for the steamfitters to shift the planks composing the platform as their work required. The lumber composing the entire scaffold was all wind-shaken, knotty and inferior. The board that broke was rough on one side and the other side was smooth but had become dirty from being in contact with concrete. On the rough side, which was up while plaintiff was working, the knot and cross-grain were not distinct and

would not be readily noticed. This side was up when plaintiff used it.

The testimony on the part of the defendant as set out and as claimed by appellant's counsel tended to show that there were a number of gangs of workmen at work in defendant's plant, each under its own foreman and all under a common superintendent. Said gangs were the carpenter gang, steamfitters' gang, iron-workers' gang, concrete-workers' gang, etc. Scaffolds consisting of supports and coverings were in use throughout the extensive premises of defendant's plant. The supports of each scaffold were originally put in position by the gangs as they went about. Such supports would often be left in position and a subsequent gang would use them. Normally a gang that finished doing work at a given place would remove the planks or covering of the scaffold structure, but leave the scaffold proper or supports, and the next gang coming along would select its own planks and place them upon the said supports. This was done by the gang in which plaintiff worked as well as by the other gangs. If a gang should reach a place where scaffolds as well as planks were already in position, they could use same or could substitute others. The members of each gang could do anything that to them seemed necessary to accomplish the work.

At the close of the testimony the defendant interposed a demurrer to it which the court overruled, defendant excepting.

At the instance of plaintiff the court gave three instructions, the first being a general instruction covering the case. As it is rather long and only one feature of it is complained of, we give substantially the context to bring out the part complained of. After instructing the jury to the effect that if they found that plaintiff was in the service of defendant and that there was a scaffold in the tower having a platform composed of planks and that plaintiff was on the platform at his work and

while thereon one of the planks broke and caused plaintiff to fall and sustain the injuries complained of, and if they find that the plank contained a knot and was cross-grained and thereby was not reasonably safe for use in the platform and was insufficient in the platform to bear the weight of plaintiff and hence broke, and if the jury find from the evidence "*that defendant provided and furnished said plank for use in said platform,*" and knew or by the exercise of ordinary care would have known that the plank was not reasonably safe for use in the platform and insufficient in the platform to bear the weight of plaintiff and of the danger of injury to plaintiff from being on the plank in the platform "*before it provided said plank for use in said platform;* and if the jury further find from the evidence *that defendant in furnishing and providing said plank for use in said platform* failed to exercise ordinary care, and that such failure, if the jury find from the evidence there was such a failure, directly caused the injuries to plaintiff," and if they find plaintiff was exercising ordinary care at the time he was injured "and at the other times mentioned in the evidence prior thereto," etc., then the jury will find for plaintiff.

The defendant prayed the court to give an instruction, marked "Instruction C," which the court refused to give, defendant excepting. At the instance of defendant the court gave four instructions. In the view we take of the case it is not necessary to set out any of them.

The jury returned a verdict for plaintiff in the sum of \$2500, nine of the jurors concurring, and in due time thereafter defendant filed its motion for a new trial, which being overruled and exceptions saved the case is duly here on defendant's appeal.

REYNOLDS, P. J. (after stating the facts).—The errors assigned in this court by counsel for appellant

are, first, that the court erred in refusing to give an instruction in the nature of a demurrer to the evidence asked by appellant; that it erred in refusing to give the instruction marked "Instruction C;" and that the court erred in giving the first instructions asked for the defendant. The objections urged to the first instruction are to the words which we have italicized, that is to say, to the words in that instruction which told the jury that they could find for plaintiff if they found that he had been hurt and "that defendant provided and furnished said plank for use in said platform," and the words further along in that instruction, "and if the jury further find from the evidence that defendant in furnishing and providing said plank for use in said platform failed to exercise ordinary care." It is objected to these clauses or phrases in this instruction that they assume that the defendant had provided and furnished the plank, the breaking of which was the cause of the accident, and it is insisted that there is no evidence in the case that the defendant had provided and furnished said plank for use in this platform. We think that this criticism of the instruction is valid and that the presence of these words in this instruction was harmful error. The evidence shows very clearly that plaintiff and his fellow-workmen, pipefitters, picked out and selected these planks themselves. Neither of the vice-principals, Tenney or Saffley, was present when they selected these boards. All the direction that these fitters had from either of these men was when they were through working at one place to go to another where there was scaffolding and work there. The selection of the boards to go on the west scaffolding was left to them. They were not told by any one what boards to take nor where to take them from. When they got to this south scaffolding they found no platform and that the carpenters were about to remove the boards from the west scaffold and carry them to another platform or scaffolding. Gallagher, who, while apparently

the head of this particular gang of fitters—plaintiff and Altman being fitters' helpers, all of them practically fellow-workmen—asked the carpenters to leave them a couple of those planks which had been in use in the west scaffold. The carpenters did so and let them have two, which the fitters took from the carpenter as he was carrying them away and placed them in position on this south scaffold. One of them broke. There is no evidence that anyone who can be said to have been the representative of defendant furnished these particular planks to these fitters, with which to build this platform on which they were to work. So that these words, as used in this instruction, in leading the jury to believe that under the law and the facts they had a right to assume that the employer had furnished the defective board, were without evidence to support them, were misleading and should not have been used. Moreover, the employer is responsible only when either actual knowledge of the defective tool or appliance is brought home to him, or such facts are in evidence as warrant the jury to assume that he has or should have such knowledge. The employer is chargeable with notice and knowledge of those things which he ought to know. No such actual or constructive knowledge is, in this case, brought home to the employer. No one authorized by his position or employment to represent the employer knew that these men were about to use this board. Nor is any knowledge of its defective condition brought home to defendant. Its selection and use were one act—no time intervening in which any one representing the defendant could know either fact. [Burnes v. Kansas City, Ft. S. & M. R. Co., 129 Mo. 41, 1. c. 52, 31 S. W. 347.] The defect in the board was one that plaintiff himself has testified could have been discovered on inspection; inspection would have shown it to have been defective and unsafe and unfit to bear the weight proposed to be put on it. It was a cross-grained, knotty plank. Plaintiff and his fellow-workmen selected it. Counsel on either



side refer to and quote from *Bowen v. Chicago, B. & K. C. Ry. Co.*, 95 Mo. 268, 8 S. W. 230, in support of their position. Learned counsel for appellant quote from it that portion which is on page 277, commencing with the words, "A servant is not a mere machine, employed to drive a nail here or a spike there," and ends the quotation with the authorities cited in support of that proposition; while the equally learned and industrious counsel for the respondent quotes from the same case, commencing exactly where counsel for respondent left off on page 277, but quoting only the rest of it on that page. On the very next page, however, page 278, the court says: "Now in this case it is no part of the duty of the plaintiff to build or to keep the bridge in repair. Neither he nor his foreman had anything to do with it. It was held out to him as reasonably safe for the passage of construction trains, by the very act of taking him back and forth. The bridge was planned and built under the supervision of foremen, employed for that purpose. The acts of these foremen were the acts of their principal, and not the acts of a fellow-servant of the plaintiff." This language, taken in connection with the facts of the case, shows that the point in decision does not meet the case at bar. Here plaintiff and his fellow-workmen selected these boards themselves and put them into position. It is true, and necessarily so, that they selected them from material furnished by the master, the employer, but the evidence shows that there was a large quantity of boards available and serviceable for use and that the selection of the particular board was a matter in which neither the employer nor any of the foremen directly in charge of the work had anything whatever to do. It falls in a measure under the principle announced in that part of the opinion in the *Bowen* case which is quoted by counsel for appellant, to the effect that where the master employs competent workmen and provides suitable material for staging and entrusts the duty of erecting it to the workmen, as a part of the

work which they are engaged to perform, the employer is not liable to the workman for injuries resulting from falling off of the staging. "The negligence in such cases," says the court, "resolves itself into negligence of a fellow-servant."

The case of *Forbes v. Dunnevant*, 198 Mo. 193, 95 S. W. 934, is more nearly analogous in its facts to the facts in the case at bar. In that case it is said that the master may trust the servant to perform the intermediate, the ordinary and simple duties incident to the servant's employment and rest upon the servant's knowledge and skill. "The master buys a mass of raw material—some bad, some good." But says the court, "must he be present in person, or constructively, at every precise moment of time to select and deliver to that carpenter a sound board, so that the carpenter will not hurt himself or fellow-craftsmen or may he trust that carpenter to select a good board from the mass of raw material? We think there can be but one answer to this question."

We are referred to the cases of *Combs v. Rountree Const. Co.*, 205 Mo. 367, 104 S. W. 77, and *Kennedy v. Laclede Gas Light Co.*, 215 Mo. 688, 115 S. W. 407. On an examination of those cases, we do not think that the facts in them are applicable to the case at bar.

Our conclusion upon the whole case is that the demurrer to the evidence at the close of the case should have been given, on the ground that there was no evidence in the case on which the liability of the employer, defendant in the case, can be attached to make it responsible for the selection of the board, the breaking of which was the cause of the accident. Plaintiff's own testimony fails to establish knowledge of the defect on his employer, and further shows that he and his fellow-workmen—without direction from the employer, selected this defective board; that without any examination of its condition he used it, and that the slightest inspection on his part would have shown him that it was

unsafe. So that by his own carelessness he caused his hurt.

The judgment of the circuit court is reversed. *Goode, J.*, concurs; *Nortoni, J.*, dissents.

### DISSENTING OPINION.

NORTONI, J.—The question in this case is a close one but I incline to the opinion it was for the jury. The facts in proof do not disclose a case where the master has furnished a considerable quantity of lumber out of which the servants are to select boards for scaffolds but, instead, it appears there were several scaffolds theretofore constructed by the carpenters and then standing. Further, plaintiff testified he and his companions were neither expected nor required to build the scaffolds.

It is conceded defendant's foreman, Tenney, instructed plaintiff and his companion steamfitters to use the standing scaffolds in performing their task of fitting steam pipes. Tenney was not a fellow-servant of plaintiff but, on the contrary, was the master's representative, and it seems to me that his direction to plaintiff and his companions to use the scaffolds then standing involved an assurance of the master to the effect that they were reasonably safe for the purpose intended. This, of course, involved the idea that the boards on top of such scaffolds on which the men were to stand and walk were reasonably safe for the purpose as well. It is true plaintiff was not injured by falling from a scaffold pointed out by Tenney, but he was injured by the breaking of a board in use on such scaffold though it had been removed a few feet away by plaintiff and his companions to another scaffold where they were then at work. Having completed the task on the scaffold immediately west, they removed the boards from it to the theretofore uncovered scaffold on the south of the coal tower, and it was on this scaffold the board broke which

resulted in plaintiff's injury. But the board was one in use on the scaffold pointed out by Tenney.

It seems there were scaffolds intact, that is, properly covered with boards, and others standing without such covering at the time Tenney gave the general order to the steamfitters to use the same. Of course, the only way the steamfitters could use the uncovered scaffolds would be to cover them with the lumber from those on which they had been working, and it is clear that Tenney, the foreman, directed the use of such lumber on the scaffolds where it then was. Besides, plaintiff testified that it was no part of the duty of himself or companions to build the scaffold. It seems to be a fair construction of Tenney's order that the steamfitters should remove the covering boards from the other scaffolds and place them upon the one from which plaintiff fell, otherwise the order was insufficient to the end in contemplation. Thus viewing the testimony, I am of opinion that it was for the jury to answer whether or not defendant furnished the board in question.

As to the contributory negligence of plaintiff, I think that, too, was a question for the jury. In the circumstances of the case, the particular board involved presented no such features of danger as to threaten imminent peril. Others having used it in the scaffold then standing, an ordinarily prudent person would not scan it for defects as closely as he might on selecting it in the first instance. Then, too, it seems to have been rough on one side and discolored by use on the other so the knot which occasioned its breaking was concealed. I am persuaded the defect in the board was one not likely to be disclosed upon such an inspection as an ordinarily prudent workman would make in the light of the circumstances that he and others had immediately theretofore safely used it in the standing scaffold for the same purpose. It is entirely clear to my mind that plaintiff should not be adjudged guilty of contributory negligence as a matter of law.

Though it may be conceded, the question as to whether defendant furnished plaintiff and his companions the plank for scaffold purposes is a close one, I believe there is sufficient in the proof to send it to the jury. Entertaining this view, I respectfully dissent.

ON MOTION FOR REHEARING.

MAY 31, 1910.

REYNOLDS, P. J.—In his motion for rehearing, counsel for appellant relies mainly upon the dissenting opinion of our learned and careful associate, Judge NORTON, as grounds for sustaining that motion. While recognizing the great care of our learned associate in all matters coming under his observation, we are compelled to say that we think he has misunderstood or inadvertently overlooked very material facts in evidence. To demonstrate that, we consider it not out of place to supplement the statement of facts set out in the prevailing opinion in the case by the substance of a part of such of the evidence as covers the matter of these scaffoldings and the boards and flooring a little more fully than we did in that opinion. We use for this the respondent's additional abstract of the record, in which he has set out verbatim the testimony of the plaintiff and of most of his witnesses. It is to be understood that there were two sets of scaffolding in place, one on the west side of a coal chute, which is hereafter called the west scaffolding, the other on the south side of that chute, and hereafter called the south scaffolding. It is to be understood that in speaking of the scaffolding, reference is made to the uprights and crosspieces that composed the scaffoldings and not to the flooring upon them which had to be placed on the scaffolding, if not already there when the men went to work. The selection of boards, when there were none on the scaffolding, was left to the men themselves. It is important to keep

the distinction in mind between the scaffolding as in place and as it would be when used. That is, the scaffolds themselves were mere skeleton frames, composed of uprights and supports—the latter such as joints in buildings, the scaffolds not capable of use until flooring was laid on them on which the workmen, who would use them from time to time, were to stand. This flooring consisted of loose boards, not nailed on to the scaffolding. The practice, the usage, as clearly appears by the testimony, was that when a gang were to work on a scaffolding which had no flooring, the gang put down the flooring. No one directed them where to get the boards for the flooring. The gang of which plaintiff was one of the members had been working on the west scaffold. They had been told by Saffley, their immediate superior, that when they finished their work on the west scaffold, to move around on to the south scaffold and do certain work there. When the men went to this south scaffold they found it without flooring. It then became their duty to find and put on floor boards. Neither Saffley nor any one else told the gang where to get flooring. Plaintiff's own testimony is, to give his exact words, "When we got through on the west side we threw the two boards around and put the pipe on the south side." Asked what boards they had thrown around, he said, the boards they had been using that were on the west scaffolding. These were two of the six boards the carpenters were in the act of removing, in fact it appears they had removed them, and not knowing that the fitters or others would want to use the west scaffold any more, were in the act of carrying them away, and as stated before, on the request of the fitters, let them have the two they had in their hands. These boards were two inches thick, six inches wide and fourteen feet long. They were loose boards. Asked after they got through on the west side what they then did, plaintiff answered, "We shoved the two planks that were lying on top around to the south side, to get on, and

put up that pipe." That is, they took two of these boards that had been on the west scaffold for use on the south scaffold. There were only *two* supports (joists) in the scaffolding to the south. The distance between these two supports on the *south* side, according to the plaintiff's testimony, was between seven, eight or nine feet, not over nine feet, *about nine feet*, he said on cross-examination. The supports on the west scaffolding were *between seven and eight feet apart*. On the west scaffolding there were *three supports* or joists. That is, when these boards, fourteen foot planks, were in place on the *west* side, they rested on *three supports, seven or eight feet apart*, but when they were carried around to the *south* scaffolding, they rested on only *two supports*, which were from *eight to nine feet apart*. When these planks were in place on the west side, the two boards selected appear to have been on top of other boards,—plaintiff speaks of taking them "from the top," of that west scaffolding, and were supported in the middle by the *third* support or joist which that scaffolding had, the other two supports, of course, being at either end of the planks. When these two boards were removed from the west to the south scaffolding, there were but two supports under them, one on each end and none in the middle. So that it is very evident that the two supports on the south scaffolding, on which the boards rested, were farther apart by at least a foot, possibly as much as two feet, than were the three supports in the west scaffolding. Plaintiff himself testifies that when the boards were laid on the south scaffolding *they projected over* the supports about two feet on one end and about three or three and a half feet on the other. When the plank broke which had been taken from the west and put on the south scaffolding, plaintiff was about the middle of it, consequently standing where there was the most strain and the least support to the plank, which before that had not only been supported in the middle by the middle joist, when it was on the

west scaffolding, but when as there used had apparently been on top of other boards. With this statement of the facts, as testified to by the plaintiff himself, which facts have evidently escaped the attention of our learned associate, a very different situation and use is presented as to this plank when on the west scaffold from that which arose when it was put to use in the south one. It cannot be argued that the plank which was the cause of the accident was used in the same manner that it had been used when on the west scaffolding. It may have been and was safe as used in the west; it broke when used under entirely different conditions in the south. In other words, when it was in place on the west scaffolding, it appears to have been on top of other planks and it certainly was supported through or under the middle, by a joist; when it was in place on the south scaffolding it was unsupported in or under the middle and rested on but two supports or joists. And plaintiff and his fellow-workmen selected and put it in place themselves, knowing how it had been before then used and supported. It follows from this, in our judgment, that because plaintiff and his fellow-workmen had used it with safety on the west scaffolding, they had no right to assume and it did not follow that they could use it on the south scaffolding, aware as they were of the difference in the construction of the two scaffoldings; differing in so far as strength was concerned and so far as support of the plank or flooring was concerned, and, according to plaintiff's own testimony, as we understand it, when this plank was in use on the west scaffolding it was given the added support and strength afforded by another plank under it. Hence, the inference sought to be drawn from the fact that because it had been safely used in one scaffolding plaintiff was warranted in using it in the other, falls, as the conditions were entirely different.

Our learned associate is also under a misapprehension as to the testimony in the case when he states that



there were no other planks or boards that could have been selected by this gang of fitters. It is true that other planks were not upon the floor upon which they were working, but it is also admitted by plaintiff himself that on the floor below was a large quantity of material at their use and from which they could select flooring, and which they could easily have hoisted up to the floor where they were, as the appliance for hoisting seems to have been there, plaintiff himself admitting this. The fact that the plaintiff and his fellow-workmen selected these two particular planks obviously was because they happened to be nearest and easiest. No one directed them to take them. All that the foreman told them was when they finished at one scaffold to go to another. Neither he nor any one else said a word by way of direction as to the building or placing the floors. In point of facts the boards about to be removed from the west scaffolding by the carpenters, who intended using them in another place, were being carried away by the carpenters, when plaintiff and his co-workers, obviously to save themselves labor and to save time, asked the carpenters to turn them over to them,—to let them have them. Whereupon they took them and put them in place or were putting them in place themselves, when the accident occurred. With these facts in the record, other facts being as stated in the first opinion of the majority, we see no reason to change the conclusion before announced. In addition to the cases cited in the first opinion we refer to *Fraser v. Red River Lumber Co.*, 45 Minn. 235 and *Hoar v. Merritt*, 62 Mich. 386, as applicable in many of their features to the facts in the case at bar and the decisions in which are in line with what we have announced. The motion for rehearing is overruled, *Goode, J.*, concurring, *Nortoni, J.*, dissenting.

ADALINE BRISCOE et al., Appellants, v. W. W.  
LONGMIRE et al., Respondents.

St. Louis Court of Appeals. Submitted on Briefs, January 3, 1910.  
Opinion Filed May 17, 1910.

1. **JURISDICTION: Supreme Court: Effect of Returning Case to Court of Appeals: Title to Real Estate Involved.** Where the Court of Appeals transfers a case to the Supreme Court as directly involving the title to real property, within the exclusive appellate jurisdiction of that court, and that court on motion sends the case back to the Court of Appeals for determination, it will be presumed the Supreme Court conclusively determined the case was not one in which title to real estate was directly involved.
2. **VENUE: Jurisdiction: Suit Affecting Title to Land.** A suit to restrain the sale of land under a trust deed, on the ground the mortgagee, in seeking to relieve himself of the requirements of the third constitutional amendment of 1900, requiring him to pay taxes on the mortgage debt, induced the mortgagor to execute the notes and the mortgage securing them to secure and guarantee the payment of all taxes on the property and on the mortgage debt during the existence of the debt, and that the makers of the notes had paid all the taxes, and that neither the mortgagee nor his assignee had at any time paid any of the taxes, so that there was no consideration for the notes, is not a suit whereby title to real estate may be affected, which under the statute must be brought in the county where the real estate is situated.
3. **APPELLATE PRACTICE: Grounds not Passed on by Trial Court.** Where a demurrer to a petition assigning several grounds of demurrer was sustained on one of the grounds only and on appeal it is determined the court was in error in so doing, the judgment will be reversed and the cause remanded in order to give the trial court an opportunity to pass on the other grounds assigned in the demurrer, as the appellate court is a court of review and acts on such matters only as have been passed upon by the trial court.

Appeal from Monroe Circuit Court.—*Hon. David H. Eby*, Judge.

REVERSED AND REMANDED (*with directions*).

*J. O. Allison and Ben E. Hulse for appellants.*

(1) The position of the plaintiffs is that the title to real estate is not involved in this action. A suit in equity to enjoin the sale of real estate under a deed of trust on the ground that the debt has been paid is not an action involving the title to real estate. *Gay v. Savings and Bldg. Assn.*, 149 Mo. 606; *Bonner v. Lisenby*, 157 Mo. 165; *State ex rel. v. Dearing*, 180 Mo. 53; *Christopher v. Home and Sav. Assn.*, 180 Mo. 568. (2) Where the validity of a mortgage or deed of trust on land, as such, is not called in question, but its cancellation is sought on the ground that the obligation it was given to secure has been paid or otherwise satisfied, and the only issue in the case is whether or not it has been satisfied, the title to real estate is not involved. *Christopher v. Home and Sav. Assn.*, 180 Mo. 568; *Klingelhofer v. Smith*, 171 Mo. 455; *Balz v. Nelson*, 171 Mo. 682; *Granitoid Co. v. Klein*, 170 Mo. 225; *Vandergrif v. Brook*, 158 Mo. 681; *Bradley v. Insurance Co.*, 163 Mo. 553; *Bonner v. Lisenby*, 157 Mo. 165; *Edwards v. Railroad*, 148 Mo. 513; *Rothrock v. Lumber Co.*, 146 Mo. 57; *Gay v. Savings and Bldg. Assn.*, 149 Mo. 606; *Price v. Blankenship*, 144 Mo. 203; *State ex rel. v. Dearing*, 180 Mo. 53; *Hewitt v. Price*, 204 Mo. 31. (3) The relief sought in this case would not, if granted, directly affect the title to the real estate involved. The deed of trust, as such, securing the notes mentioned in plaintiffs' petition, is not assailed or attacked. While it is true that, as a sequence of the judgment plaintiffs seek, the title to the real estate involved would be relieved of the lien of the deed of trust, that is only the indirect and not the direct effect of the judgment. An adjudication, upon a motion to quash, that land levied upon was defendant's homestead does not involve the title to real estate. *Snodgrass v. Copple et al.*, 203 Mo. 480; *Price v. Blankenship*, 144 Mo. 1. c. 208; *McAnaw v. Matthis*, 129 Mo. 142; *Brewing Assn. v. Howard*, 150

Mo. 445; Stinson v. Call, 163 Mo. 323; State ex rel. v. Elliott, 180 Mo. 658; Lawson v. Hammond, 191 Mo. 522; Moore v. Stemmons, 192 Mo. 46. (4) The enforcement of a mechanic's lien only incidentally affects the title to real estate. The title is involved only when the judgment itself affects the title to the land, and not simply when that judgment is adjudged to be a lien on the land. Conversely when the judgment simply relieves the title of an existing lien, the title is affected only incidentally. Granitoid Co. v. Klein, 170 Mo. 225; Price v. Blankenship, 144 Mo. 203; Vandergrif v. Brock, 158 Mo. 681.

*Ragland & McAllister* for respondents.

REYNOLDS, P. J.—In the petition in this suit, instituted in Monroe county, plaintiff prays that a certain deed of trust covering lands in Ralls county be adjudged null and void and not a lien on the real estate described in it; that the deed of trust be set aside and cancelled of record, and that five promissory notes, each for the sum of forty-five dollars therein described, be adjudged null and void and cancelled, and that the defendant in each of them be perpetually restrained and enjoined from proceeding under the deed of trust to foreclose or sell the real estate or any part thereof and that in the meantime a temporary injunction be allowed and granted, restraining the defendants and each of them from proceeding to foreclose and sell the real estate therein described in the deed of trust, with a prayer for general relief. The ground stated in the petition for the cancellation of the notes is that there was a total failure of consideration as to the notes; that at the time of the execution of the notes the third constitutional amendment to the Constitution of Missouri, adopted in 1900 and relating to the taxation of mortgages, deeds of trust and other contract liens securing debts, had not been "overturned" by the Supreme Court of this State (See Russell v. Croy, 164 Mo. 69,

63 S. W. 849) ; that the payee of the notes, who was the mortgagee seeking and endeavoring to relieve himself of the requirements of the constitutional amendment requiring him to pay the taxes on the mortgage debt of three thousand dollars, had induced and required the mortgagor to execute these notes and the mortgage securing them, to secure and guarantee the payment of all taxes levied and assessed on or against the real estate and against the mortgage debt during the existence of the debt and until the same was paid and satisfied and to indemnify the mortgagee from the payment of taxes, should he be required to pay them. It is averred that the makers of the notes have paid all taxes on the real estate described in the mortgage and that no taxes remain unpaid and that neither the payee of the notes nor his assignee, who is one of the defendants in this suit, had at any time paid any taxes on the real estate or the mortgage debt. It is further averred that the trustee and present holder of the notes are now threatening and are proceeding and are about to foreclose the deed of trust and to sell the real estate for the purpose of satisfying the deed of trust and notes; that the trustee has advertised the sale as required by law, having given notice that he will sell the same at New London, in Ralls county, in exercise of the powers given him by the terms of the deed of trust, and it is this sale that is sought to be enjoined and to prevent which the temporary injunction was issued.

It is also averred that after the execution of the deed of trust, plaintiff Krall had acquired the interest of one of the plaintiffs in part of the land, and plaintiff Dimmitt had acquired title to other interest in it; that these titles had been passed by warranty deeds from one or more of the plaintiffs and that unless the defendants be restrained and enjoined from selling the real estate under the deed of trust, by such sale title will be divested out of Krall and Dimmitt, and thereby caus-

ing a breach of the warranty contained in the deeds to them.

There are other allegations in the petition, but these are the material ones, necessary to the understanding of the conclusion at which we have arrived.

After the temporary injunction restraining the sale under the deed of trust had issued, defendants appear to have answered. The answer is not in the abstract and presumably was withdrawn. The motion to dissolve the temporary injunction sets out practically the same grounds covered by the demurrer, which latter assigns four causes: First, that it appears upon the face of the petition that the circuit court of Monroe county, in which the suit was pending and to which it was brought, had no jurisdiction of the subject-matter of the action, for the reason that the action is one whereby title to real estate, situated wholly in Ralls county, "may be affected." The second ground is, that it appears on the face of the petition that there is a defect of necessary parties plaintiff; the third ground is that there is a misjoinder of parties plaintiff in that parties are joined as plaintiffs between whom there is no community of interest. A fourth ground of demurrer is, that the petition does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court upon the sole ground that the court in Monroe county had no jurisdiction of the subject-matter of the action, it affecting real estate lying wholly in Ralls county. Plaintiff declining to plead further, the action of the circuit court in granting a temporary injunction was set aside, the temporary injunction dissolved and judgment entered against the plaintiff's on the demurrer, dismissing their cause. From this judgment the plaintiffs have duly prosecuted their appeal to this court.

When the case was first reached on the docket here, it was transferred to the Supreme Court, this court being of the opinion that it was a cause within the exclusive

appellate jurisdiction of the Supreme Court, as one in which the title to real estate was directly involved. The Supreme Court, on motion, sent the case back to this court and it is now here for our determination. We must assume that the Supreme Court, by its action, has conclusively determined that this is not a case in which the title to real estate is directly involved. In view of that and on further consideration, we have determined that the conclusion of the learned trial judge in sustaining the demurrer upon the sole ground that the court in Monroe county had no jurisdiction of the subject-matter of the action, was error. On reconsideration, we have all concluded that the case of *State ex rel. v. Dearing*, 180 Mo. 53, 79 S. W. 454, must govern and that what appeared to be a contrary ruling in *Castleman v. Castleman*, 184 Mo. 432, 83 S. W. 757, is not applicable to the facts of this case. This is a court of review, acting on such matters as have been duly considered and passed upon by the trial courts. In fairness to the learned circuit judge and to the parties themselves, that judge should be given an opportunity to pass upon the other grounds assigned in the demurrer. The opinion heretofore filed by us in this cause, holding that the demurrer was properly sustained on the one ground assigned, is withdrawn and the judgment of the circuit court in sustaining the demurrer for the cause assigned is reversed and the cause remanded with directions to proceed further in consideration of the case in accordance with law and as herein indicated. All concur.

**F. D. OELLIEN, Appellant, v. MRS. JEANETTE  
DUNCAN, Respondent.**

**St. Louis Court of Appeals. Submitted on Briefs, May 2, 1910.  
Opinion Filed May 17, 1910.**

- 1. APPELLATE PRACTICE: Conclusiveness of Court's Finding.** Where no declarations of law are asked or given and no exceptions saved to the introduction of evidence, it being impossible to determine the trial court's theory, its finding will not be disturbed on appeal.
- 2. CONTRACTS: Procuring Loan: Modification.** A contract, by which the owner of property authorized an agent to procure a loan for a commission and agreed to furnish a certificate of title showing the title to be clear of all liens and taxes for the current year, clearly expressed the intention of the parties, and the agent could not thereafter annex new conditions thereto, by requiring the owner to give bond against mechanics' liens by persons then erecting a house on the property, or to procure subcontractors' and materialmen's receipts from such persons.
- 3. REAL ESTATE BROKERS: Commissions for Making Loan: Performance by Broker.** In an action by an agent to recover commission for securing a loan on defendant's property, where the proposed lender secured by the agent would not lend the money on the conditions provided in the contract of agency, but insisted upon a compliance with other conditions, the agent was not entitled to recover.

**Appeal from St. Louis City Circuit Court.—Hon. Hugo  
Muench, Judge.**

**AFFIRMED.**

*Taylor Young* for appellant.

(1) (a) The words "all liens" in the letter of November 7, 1907, set out in appellant's statement, means the right to file liens, as well as the actual filing thereof, without regard to the previous negotiations between Gatlin and Mr. Duncan, agents of the respondent in procuring the loan, on one hand, and appellant on the



other. *Douglass v. Zinc Co.*, 56 Mo. 388; *Morgan v. Campbell*, 22 Wall. 390. (b) If appellant's first contention should fail him he insists that the contract between appellant and respondent is to be found in the letters of November 7 and 8, 1907, and the conversations between appellant and respondent's husband about a week previous thereto. When construed together there is no question but what it was the intention of the parties to protect appellant against the possibility of the filing of mechanics' liens. The cardinal principle of construction is to ascertain the intention of the parties, as expressed in the words they have used, and in cases of doubt all the negotiations between the parties ought to be considered in giving the contract a construction. *Farley v. Pettes*, 5 Mo. App. 262; *Davis v. Hendrix*, 59 Mo. App. 444. (2) (a) A stipulation in a contract that it shall not be assigned is binding on the parties. *Andrew v. Meyerdirick*, 87 Md. 511; *Tabler v. Sheffield Land Co.*, 79 Ala. 377. (b) A *fortiori* should such a stipulation in favor of a surety be upheld. Sureties are favorites of the law. The contract of a surety must be strictly construed, and imposes upon the surety only those burdens clearly within its terms, and cannot be extended by implication or presumption. *Mitchell & Bro. v. Railton*, 45 Mo. App. 277; *Beers v. Wolff*, 116 Mo. 179; *Gray v. Davis*, 85 Mo. App. 451.

*Robert M. Zeppenfeld* for respondent.

(1) In order to constitute a contract, there must be a proposal on one hand and an unconditional acceptance thereof on the other. *Whedon v. Ames*, 28 Mo. App. 243; *Scott v. Davis*, 141 Mo. 213; *Bruner v. Wheaton*, 46 Mo. 363; *Strange v. Crowley*, 91 Mo. 287. (2) Subsequent acts of the parties tending to show the construction put upon the terms of the contract by the parties themselves may be considered where the meaning is doubtful. *Ellis v. Harrison*, 104 Mo. 270;

Gas Light Co. v. City of St. Louis, 46 Mo. 121. (3) A broker must prove title not clear of liens. Block v. Ryan, 4 App. Cas. (D. C.) 283; Brackenridge v. Claridge, 91 Tex. 527. (4) The object to be attained in construing a contract is to get at the intention of the parties. Words are to be construed according to a strict and primary acceptance unless from the context of the instrument and the intent of the parties to be collected from it they appear to be used in a different sense, or unless in their strict meaning they are incapable of being carried into effect. Burress v. Clair, 61 Mo. 133. (5) When a broker knows the status of his employers' title he is not entitled to a commission if a loan falls through by reason of a defect therein. Hynes v. Bretelle, 70 Mo. App. 344. (6) A real estate agent in order to receive commissions for procuring a loan must show that he had procured a party who was ready and willing to make the loan upon the terms offered by the principal. Hayden v. Grillo, 26 Mo. App. 289; Butts v. Ruby, 85 Mo. App. 405.

REYNOLDS, P. J.—This action was commenced before a justice of the peace to recover a commission claimed to be due for securing a loan on property of the defendant. From a judgment against plaintiff in the justice's court, plaintiff appealed to the circuit court, where the case was tried *de novo* before the court, a jury being waived. The contract in evidence and the foundation of the action authorized plaintiff to procure a loan on property of defendant, situated in the city of St. Louis, the concluding clause of it being as follows: "I hereby agree to furnish and pay for certificate of title, furnish you with fire and tornado insurance policies, and pay for preparing papers, recording deed of trust and pay you two and one-half (2 1-2) per cent commission for your services in procuring said loan. The title to be clear of all liens and taxes for the year 1907." This was signed by the defendant and is dated

November 7, 1907. Under the date is the signature of the plaintiff and under that is written, "I accept and agree to make above loan of five thousand dollars. Signed. J. A. Hurster." It appears by the testimony in the case that on this 7th day of November, when the parties had met and were talking the matter over after the foregoing contract had been signed, a question came up between them as to turning over to plaintiff or to his principal, Hurster, an indemnity bond which defendant held from the builder, who was erecting a house upon the premises and which house was not completed at the time. This bond was signed by a surety company and indemnified defendant against mechanics' liens and appears to have contained no provision to the effect that it could not be assigned by the parties without the consent of the bonding company. When the plaintiff and defendant and Hurster met on November 7th, and after the contract had been signed, they went together to the office of the attorney for plaintiff, who also was the attorney for Hurster, defendant taking with her her title deeds and abstract and other papers and also the bond. When the attorney examined the bond and found the clause in it providing against assignment without the consent of the bonding company, he called up the agent of that company on the telephone and asked if the company would consent to the assignment of the bond. The agent refused consent. Whereupon plaintiff and his attorney demanded that the defendant procure the receipts of the contractor, showing that he had paid out certain money theretofore paid by defendant for labor and material, saying that that would be satisfactory instead of the assignment of the bond. Defendant undertook to obtain these receipts but the contractor refused to turn them over, apparently taking offense at some remarks of the attorney. It was in evidence that the attorney had thereupon said that without the receipts he would advise his client Hurster not to make the loan. This, however, was denied by the witnesses for

plaintiff. At any rate, under date of the following day, plaintiff sent defendant a letter, addressed to her at her home in Lebanon, Illinois, in which he wrote that in pursuance of her instructions and confirmed by her letter, he begged to advise that he had made the loan and that he found that it would be impossible for defendant to furnish a title free from liens unless the contractor either presented subcontractor's and materialmen's receipts or a bond was given the principal of the plaintiff, guaranteeing him against such liens. This letter appears to have been received by the defendant the day after its purported date. There was evidence that defendant did not produce the receipts but insisted on standing on the contract for the loan as written and insisting that the requirement for the production of the receipts or the assignment of the bonds was not contemplated in the contract, and that under the contract she was not required to give a bond against mechanics' liens, demanded the money on the loan. Plaintiff, however, apparently standing on his demand, as set out in the letter last referred to, did not make the loan and the negotiation fell through, whereupon plaintiff sued for his commission on the theory that he had procured the loan.

It is unnecessary to go over the evidence at length. There were no declarations of law asked or given. At the conclusion of the trial there was a finding and judgment against defendant from which he has duly perfected his appeal to this court. Yielding to the presumption which always follows the action of the trial court in actions at law, when there are no declarations of law asked or given, there being no exceptions to the introduction of evidence in the record, and it being impossible to determine the theory upon which the learned trial court proceeded, we see no reason to disturb his finding. He had before him the testimony as to making the contract and as to the interpretation the parties put on it by their acts at the time, and his conclusion on that

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Stove Repair Co. v. Cornwall.

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testimony evidently was that it was not within the contemplation of the parties when they made the contract, that defendant should either give a bond against liens or turn over the receipt held by the contractor. That the contract must be held to have expressed and included all matters between the parties is clear. That the liens referred to were not subsisting liens and were not of record, appears by the testimony. That the attempt of plaintiff to interpolate new conditions into the contract after its execution, as he did by his letter of date Nov. 8th, cannot prevail, is also clear. Under these facts and in the state of the record, we think the finding and judgment are correct. We accordingly affirm the judgment. All concur.

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**NORTHWESTERN STOVE REPAIR COMPANY,**  
Respondent, v. **B. M. CORNWALL** et al., Appellants.

St. Louis Court of Appeals. Argued and Submitted May 3, 1910.  
Opinion Filed May 17, 1910.

1. **PLEADING: Discretion of Trial Court: Allowing Amendments: Appellate Practice.** The trial court has a sound discretion in allowing amended pleadings to be filed or pleadings to be withdrawn, down to the time of judgment and even thereafter, under the Statute of Jeofails, in furtherance of justice, etc.; and the appellate court will not interfere with the exercise of this discretion, unless it appear to have been unwisely exercised.
2. **APPELLATE PRACTICE: Review of Trial Court's Discretion in Allowing Amendments: Pleading: Trial Practice.** An amended pleading must present a good cause of action or a substantial defense, to entitle it to be filed; and hence where it is sought to have the discretion of the trial court in refusing to allow an amended pleading to be filed reviewed, it must appear to the appellate court that the pleading tendered presented a substantial cause of action or a substantial defense.

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3. ———: ———: **Preservation for Review: Bill of Exceptions.** Where a proposed amended answer was stricken from the files, error in refusing it cannot be reviewed unless it is called for by or contained in the bill of exceptions.
4. ———: ———: ———: **Record Proper.** An amended answer which was stricken from the files is not a part of the record proper on appeal, even though the clerk or counsel copied it into such record.
5. **CORPORATIONS: Pleading: Denial of Corporate Existence.** Where the due incorporation of a foreign corporate plaintiff was not denied by defendant under oath, its incorporation was admitted.
6. **TRIAL PRACTICE: Reception of Evidence: Offers of Proof: General Offer.** A general offer of testimony on certain questions is bad practice as liable to lead to confusion, and the court may and should refuse such offers and require the introduction of the witnesses themselves, so that the line of proof may be determined from the questions asked and thus permit intelligent rulings on the evidence; and hence defendant's offers of proof were properly refused, where he announced that he did not have the witnesses present to testify in support of the answer, but would secure them in a few moments.
7. **PLEADING: Amendments: Time.** That an amended answer was tendered on the day the case was set and called for trial was not ground for refusing it.

Appeal from St. Louis City Circuit Court.—*Hon. Wm. M. Kinsey*, Judge.

**AFFIRMED.**

*E. N. Robinson* and *S. C. Rogers* for appellants.

(1) The court erred in striking from the files the amended answer of defendants filed November 9, 1908. Because the motion was not in writing. Sec. 640, R. S. 1899. (2) The court erred in refusing to permit defendants to file their amended answer on November 11, 1908. Because the answer offered shows a meritorious defense, and because it should be the policy of the law to try causes on their merits, and because it was an abuse of discretion by the court. *Cooney v. Murdock*,

54 Mo. 349; Howell v. Stewart, 54 Mo. 400; Tucker v. St. Life Ins. Co., 63 Mo. 588; Simon v. Ryan, 101 Mo. App. 16. Rule is to allow amendments rather than refuse them and should be liberally allowed in furtherance of justice. Corrigan v. Brady, 38 Mo. App. 649; Carr v. Moss, 87 Mo. 447; Anderson, Admr., v. Hance, 49 Mo. 159. (3) The court erred in refusing to permit defendants to introduce proof proffered at trial. Because these defendants were not in court of their own volition, nor were they willing parties, and the court should have permitted them to make such defense as they had. Kenefick-Hammond Co. v. Fire Ins. Society, 205 Mo. 294.

*Rassieur, Kammerer & Rassieur* for respondent.

(1) A bill of exceptions not filed until after the expiration of the time allowed by the order of court, will not be considered on appeal. Girdner v. Bryan, 94 Mo. App. 27; Linahan v. Barley, 124 Mo. 560; Hesse v. Ins. Co., 115 Mo. App. 89; Loewen v. Hicks, 63 Mo. App. 79. (2) (a) The so-called amended answer having been stricken from the files as improperly tendered and filed in the cause, did not become a part of the record proper, and has no place in the abstract of the record. (b) The motion of appellants for leave to file an amended answer and the court's action thereon were matters of exception, which must appear by the bill of exceptions; and if the bill of exceptions fails to show in what particulars appellants desired to amend, that omission cannot be supplied by reference to a motion or other matters improperly set out in the abstract of the record. Howell v. Stewart, 54 Mo. 400; Jefferson City v. Opel, 67 Mo. 394; Ober v. Railroad, 13 Mo. App. 81; Bank v. Finks, 40 Mo. App. 367. (c) Since it does not appear from the bill of exceptions that the proposed amended answer contained matters of merit, this court will not review the action of the trial court in refusing to allow the

amendment. *Howell v. Stewart*, 54 Mo. 400; *Cashman v. Anderson*, 26 Mo. 67; *Ober v. Railroad*, 13 Mo. App. 81. (3) (a) The matter of permitting amendments of pleadings is, to a large extent, discretionary with the trial court. *Ensworth v. Barton*, 67 Mo. 622; *Clark v. Railroad*, 127 Mo. 255; *Mfg. Co. v. Givens*, 35 Mo. App. 602; *Dallam v. Bowman*, 16 Mo. 225. (b) And the action of the trial court in refusing permission to amend, will not be interfered with by an appellate court, unless it clearly appears that the discretion of the trial judge was arbitrarily and unjustly exercised. *Cullum v. Cundiff*, 20 Mo. 522; *Ensworth v. Barton*, 67 Mo. 622; *Cashman v. Anderson*, 26 Mo. 67. (c) It was not an abuse of discretion to refuse to permit an amended answer, which set up an entirely new defense, to be filed on the day of trial. *Cullum v. Cundiff*, 20 Mo. 522; *Bank v. Goldsoll*, 8 Mo. App. 595; *Cashman v. Anderson*, 26 Mo. 67.

REYNOLDS, P. J.—Action on three promissory notes alleged to have been made by the defendants, now held and owned by plaintiff, the notes dated at St. Louis. The first answer of the defendants set up lack of knowledge as to whether the plaintiff is incorporated under the laws of the state of Illinois, as claimed, and for lack of knowledge defendants say that they deny the incorporation. As a further answer it is averred that the notes sued on were part of the purchase price of the business surrendered to plaintiff by one of the defendants and which business plaintiff has ever since retained but has failed to surrender the notes, this part of the answer concluding, “now defendants deny obligation on same.” By the second paragraph of this answer, it is alleged that the indebtedness evidenced by the notes was a matter of account between plaintiff and one Robert Aiken, one of the defendants, and that on a date named *plaintiff* claimed by a specific statement that *he* (Aiken) at that time *was indebted to defendants* in the



specific sum of \$2485.16, and that all other matters had been adjusted and they therefore deny any indebtedness or obligation on the notes in suit, "and not knowing and not having means of information on the subject and wishing to throw plaintiffs upon their proof, so as the true business status or obligations of defendants, if any, to plaintiffs may be ascertained." Following this is a denial of each and every allegation in the petition. This answer had no verification of the plea of no incorporation. A general denial by way of reply was filed. It appears that on the 9th of November, 1908, the attorneys for the defendant served a copy of an amended answer on one of the counsel for the plaintiff, and this answer appears to have been filed with the clerk of the court. But on the 11th of November, 1908, and the day that the case was set and called for trial, as it appears, the court, on motion of attorneys for plaintiff, struck this amended answer from the files, the bill of exceptions stating that this action of the court in striking it from the files was because the filing of the amended answer "was a voluntary amendment not required by any former ruling of the court," and that the answer had not in fact been filed by leave of court, although so recited therein. Thereupon the defendants presented to the court this same amended answer which had been stricken from the files and asked leave to file it. The court, after consideration of the motion, refused leave to file the amended answer for the reason as stated, that it was tendered on the day when the case was set down and called for trial. Defendants duly excepted to these rulings of the court. The case was thereupon and on the succeeding day again called for trial. A jury having been waived, evidence in the case was submitted to the court sitting as a jury, plaintiff offering the three notes sued on in evidence with the credits endorsed thereon and resting. Whereupon the defendants to maintain the issues upon their part, as is set out in the bill of

exceptions, "Now offer to prove that the consideration of these notes upon which suit is brought herein was a sale of goods in this city to the defendants in this case, but that at the time of said sale and for a number of years prior thereto the plaintiff maintained an office and store in the city of St. Louis, Missouri, for the transaction of business in this State; that plaintiff is a foreign corporation, and that plaintiff did not, either prior to the sale of the stock of goods to defendants in this case or subsequent thereto, comply with the laws of Missouri with respect to foreign corporations doing business in this State; and that plaintiff did not at the time of said sale have a license from the Secretary of State to do business in the State of Missouri and paid no taxes during this period.

"We offer to prove that the actual consideration of these notes is the sale mentioned above to the defendants while plaintiff maintained an office in this State, and that the Missouri law above mentioned had not been complied with."

This was objected to by counsel for plaintiff on the ground that no issue is made by the answer before the court to which this testimony would be relevant and it was objected to as irrelevant, incompetent and immaterial. The court then said: "Do I understand from the defendants that they have present in court other witnesses and other competent evidence to prove these facts?" Whereupon counsel for the defendant said: "We can get them here in a few minutes. We submit an offer of proof. The witnesses are not actually in the court room, but we can bring them here in a few minutes." The court thereupon sustained the objection, defendants duly excepting, and this being all the evidence in the case found and rendered judgment for the plaintiff in the amount sued for, less credits. Defendants in due time filed a motion in arrest and for a new trial, which being overruled, they have brought the case here on appeal, having filed a bill of exceptions.

It is hardly necessary to remark that from the earliest decisions of our Supreme Court it has been held that the court should exercise its discretion in the most favorable and lenient way toward parties litigant, to enable them to have their cases properly in court. A sound discretion is recognized as existing in the trial judge in allowing amended pleadings to be filed or in withdrawing pleadings, down to the very instant of judgment, and under the Statute of Jeofails, even after judgment, in furtherance of justice, or to conform the pleadings to the proof, or to sustain the judgment. The exercise of this discretion in either granting or refusing such leave is rarely interfered with by the appellate courts. To authorize the appellate court to interfere it must appear that the discretion was unwisely exercised. It has, however, been universally held that the pleading tendered must present a good cause of action or a substantial defense before it should be allowed to be filed. To the exercise of the power of review of the discretion of the trial courts by the appellate courts, it must always appear to the latter that the pleading tendered did present a substantial cause of action or a substantial defense. This necessarily involves an examination by the appellate court of the pleading tendered and offered to be filed. We are precluded in the case at bar from passing on this matter one way or the other for the reason that the bill of exceptions does not call for nor contain the amended answer tendered. Therefore that answer is not before us in any legal, lawful sense. It is true that in the abstract of the record produced before us that amended answer is copied into the record proper. The trouble with that, however, is, that it is a fundamental one, that that amended answer, having been stricken from the files, was no longer a paper of record. The fact that the clerk or counsel have copied it into the record proper as if a part thereof, does not make it of the record. The bill of exceptions, the record proper even, shows it was stricken from the files and

from the record. It could then only come before us for review by being called for in the bill of exceptions and with the filing of that bill of exceptions become of record. As that was not done in this case, it is not before us. We cannot therefore determine the question as to whether it presented a substantial, valid, available defense to the cause of action stated in the petition. As will be noted by the statement, the case went to trial on the original answer. That is the only answer we can consider and we have set out the substance of that answer. The defenses there set up were all affirmative defenses. Even the incorporation of the plaintiff stood admitted for there was no denial of incorporation under oath. When the defendants were called on to produce their proof in support of their allegations in the answer, which was the only one on file or before the court, they announced that they had not their witnesses present but would secure them in a few moments. The court, as it had a perfect right to do, refused to accept offers of making proof in the absence of witnesses, undoubtedly holding to the rule that parties should put their witnesses upon the stand, ask their questions and enable the court to rule on the admissibility of the evidence as it was offered—a matter entirely within the power of the court, in fact, the only orderly way for a court to proceed. A general offer of testimony along certain lines too often leads to confusion and it is a practice not to be encouraged. It is entirely within its power and the better practice for the trial court to refuse such general offers and to require the introduction of witnesses, so that with the witnesses present and the questions asked indicating the line of proof about to be followed, the court can intelligently rule upon the testimony as offered. In this case nothing appears but the offer, at a future time, whether a few minutes or a few hours or a few days, is immaterial, to produce witnesses, unnamed and not then present, to testify, to answer unasked questions. All witnesses should have been in

court, on any possible theory, ready to testify in the case. If it be said that defendant could not anticipate that the court would strike out the answer tendered as an amended answer or would refuse leave to file it, the answer to this is that however that might have been, if the answer as amended had stood, the case was for trial on that day and with one exception the answer, as we gather from that published with the record, set up the same matters that were in the one on which the case went to trial. It is apparent that even that answer called for proof, and it appears by the record and bill of exceptions in this case that the defendants were in court without any witnesses whatever and without preparation to prove the affirmative allegations in either answer. We gather from the question of the court as to the presence of witnesses, that if they had been there present, if, in short, defendants had shown that they were, in good faith, ready to go into the trial, the court would have allowed any amendment that would have been necessary. But defendants, although going to trial, having waived a jury, produced no witnesses and no evidence. To avoid misapprehension, we add that the reason assigned by the learned trial judge for refusal of leave to file the amended answer, namely, "that it was tendered on the day when the case was set down and called for trial," is not a valid reason. If we had the paper tendered as an amended answer before us, so that we could determine whether it pleaded a substantial defense, we would be compelled to reverse the judgment, if on inspection that paper was found to set up such defense. But as the answer tendered is not before us, so that we can examine it, we are precluded from that course. In the state of this record before us, we hold that the defendants have lost their day in court by their own negligence and that the action of the circuit court in the premises must be and it is accordingly affirmed. All concur.

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STATE OF MISSOURI, Respondent, v. A. E.  
BOEHLER, Appellant.

St. Louis Court of Appeals. Argued and Submitted May 4, 1910.  
Opinion Filed May 17, 1910.

1. **APPELLATE PRACTICE: Criminal Practice: Sufficiency of Information: Failure to Preserve Motion to Quash in Bill of Exceptions.** A motion to quash an information not preserved by bill of exceptions cannot be considered on appeal, though it appears in the record proper.
2. ———: ———: ———: **Objection to Introduction of Evidence.** Where an objection is made to the admission of testimony on the ground the information states no offense, and exceptions are duly preserved to the action of the court in overruling it, the sufficiency of the information is properly before the appellate court for review.
3. **INTOXICATING LIQUORS: Storing: Acts Constituting Offense.** Laws 1907, p. 231, section 2, prohibiting the storage of intoxicants for another person in local option counties, does not prevent the storage of beer by one as agent for a brewery company, where it is not received for use or sale in the county.
4. ———: ———: **Agent of Brewery: Indictments and Informations: Necessity of Stating Whether Principal is Corporation or Partnership.** An information under Laws 1907, p. 231, section 2, charging an unlawful storage of intoxicants as agent for the "P. & G. Brewing Company," is invalid for failing to aver whether the company was a corporation or a partnership.

Appeal from Scotland Circuit Court.—*Hon. Chas. D. Stewart*, Judge.

REVERSED AND REMANDED.

*Pettingill & Montgomery* and *Wagner & Miller* for appellant.

(1) The court erred in overruling the objection to the introduction of evidence, upon the ground that the information did not charge an offense under the

statute; and in overruling a motion for a new trial, which challenged the sufficiency of the information. The information fatally departs from the statute. Laws 1907, p. 231, sec. 2; State v. Clark, 122 S. W. 665. (2) The court erred in refusing the fifth instruction requested by defendant, which properly declared the law, and was amply supported by the evidence. Laws 1907, p. 231, sec. 2. (3) The court erred in giving the second instruction requested by the State, which outran both the information and the statute. Laws 1907, p. 231, sec. 2. State v. Faulkner, 175 Mo. 546; State v. Lehman, 175 Mo. 619; Garrett v. Greenwell, 92 Mo. 121; State v. West, 21 Mo. App. 309.

*Jno. E. Luther* for respondent.

REYNOLDS, P. J.—An information was filed on the 13th of December, 1907, by the prosecuting attorney of Scotland county, wherein it is stated that the defendant, one A. E. Boehler, on or about the 13th of December, 1907, at the county of Scotland, this State, “did then and there unlawfully keep and store certain intoxicating liquors, to-wit: one hundred cases of lager beer, as the agent of the Popel & Giller Brewing Company of Warsaw, Illinois, said lager beer being stored and kept in a building located in South Gorin, Missouri, and said building being owned by the said Popel & Giller Brewing Company.” The information further alleges the adoption of the Local Option Law (art. 3, chap. 22, R. S. 1899) by Scotland county and that it had been in force in that county from and after the 30th day of November, 1905, and alleges that “said acts of storing and keeping said intoxicating liquors as above stated is (are) contrary to the form of the statute,” etc., “and against the peace and dignity of the State of Missouri.” It appears by the record proper that a motion to quash the information was duly filed and overruled, defendant excepting. The plaintiff entering a plea of “not guilty,” the case

went to trial before the court and jury and at the beginning of the trial defendant objected to the introduction of evidence for the reason, among others, that the information did not state facts sufficient to constitute a crime by defendant. This objection was overruled and testimony introduced by the state, tending to prove the receipt of cases of beer from the brewing company named by the defendant at the place named in the information and on or about the dates charged, and that the place was known as the warehouse of the brewing company named. The freight delivery receipt, which was introduced in evidence by the state, showed that one hundred cases of beer had been shipped, consignor not named, from Alexandria, "consigned to Popel & Giller," and the receipt is signed "A. E. Boehler, Agt." There was evidence to the effect that Popel & Giller Brewing Company was located at Warsaw, Illinois; Alexandria, this State, apparently being the initial point of delivery to the railroad company, and there was also evidence introduced on the part of the state that the warehouse at which the delivery was made at Gorin, in Scotland county, was known as owned or leased by the Popel & Giller Brewing Company, and that the defendant was known and recognized as their agent at that point. It was in evidence that the Local Option Law had been adopted in Scotland county, as alleged, and it was not pretended that the defendant was a licensed dramshop keeper or authorized to sell liquor as a wholesaler. The defendant introduced no testimony.

The court gave various instructions at the instance of the state, among them one to the effect that if the jury believed from the evidence that on the date named and since the 11th of August, 1907, defendant "did receive, keep or store any lager beer, whisky or any intoxicating liquor of any kind in Scotland county, Missouri, as the agent of the Popel & Giller Brewing Company of Warsaw, Illinois, they will find the defendant guilty as charged in the information and assess his punishment,"



etc. Defendant duly excepted to the giving of this. It also gave several at the instance of the defendant, but refused an instruction asked by the defendant, to the effect that if the jury believed from the evidence in the case that the Popel & Giller Brewing Company was the owner and in possession of the building and also the owner of the beer in question and that the defendant was simply its agent in storing and caring for said beer, then they should find the defendant not guilty. This was refused, exceptions being duly saved, a verdict of guilty returned and a fine of three hundred dollars assessed against the defendant, who thereupon duly filed his motion for a new trial and motion in arrest, both of which were overruled. Defendant excepted and perfected an appeal to this court, having filed his bill of exceptions in due time.

This case comes to this court by transfer from the Supreme Court, that court holding that as no constitutional question was presented by the record as having been made at the trial, that question having been first raised by the motion in arrest and the motion in arrest not being preserved by the bill of exceptions, no question within the jurisdiction of that court was before it. See *State v. Boehler*, 220 Mo. 4, 119 S. W. 385. The motion to quash the information, while appearing in the record proper, is not preserved by the bill of exceptions and cannot be noticed. The objection, however, to the admission of testimony on the ground that the information stated no offense, was interposed, exceptions duly saved at the time to the overruling of the objection, and the alleged error properly saved by the motion for new trial which is in the bill of exceptions. The question is therefore properly before us on the record as to the sufficiency of the information in stating an offense under the statute. The information is bottomed on section 2, of the act of the General Assembly of this State, approved May 10, 1907 (Session Acts, 1907, p. 231). This act is entitled, "An act to prohibit persons running order

houses from delivering intoxicating liquors to persons having no license to deal in same, and to prohibit the keeping, storing for, or delivering to another person intoxicating liquors in local option counties, and providing penalties for the violations thereof." By the first section it is enacted that "it shall be unlawful for any person or persons not a licensed dramshop keeper or by law authorized to sell liquor as a wholesaler, to order for, receive, store, keep or deliver, as the agent or otherwise, of any other person, intoxicating liquors of any kind." Section 2, on which the information purports to be founded, reads: "No person shall keep, store or deliver for or to another person, in any county that has adopted or may hereafter adopt the Local Option Law, any intoxicating liquors of any kind whatsoever." The third section provides that nothing in the act shall be construed to prohibit any person from ordering liquor for his own or his family use, where such liquor is sent direct to the person using the same; and the fourth section declares a violation of the provisions of the act a misdemeanor, subjecting the defendant to a fine of not less than three hundred dollars nor more than one thousand dollars, or imprisonment in the county jail for not less than three months nor more than one year, or by both such fine and imprisonment.

It is obvious from the history of the legislation in this State relative to the Dramshop and Local Option Law, that the evil in mind when the law was enacted was the existence of what are called "order houses." The nature of these is very clearly set out in a decision by this court in the case of *State v. Clow*, 131 Mo. App. 548, 110 S. W. 632, and their nature and the mischiefs attendant upon them and their palpable design as an evasion of the law against the sale of liquors is so clearly shown in the statement and opinion of Judge GOODE in that case, that it is sufficient to refer to it without going into detail. The object aimed at by the Act of 1907, was to suppress such institutions. From

the evidence in this case, we do not think that this defendant is brought within the language or spirit of the law. The evidence shows that he was receiving the goods, not on orders of others who desired to have them, but as agent for the brewing company; not on orders from persons in Scotland county, who might desire to obtain liquor for their own use, but as the agent or manager of the brewing company named. So far as appears by the testimony in the case and certainly outside of any charge in the information, there can be no pretense that he was receiving these goods for any person who had ordered them, and who intended to use them in Scotland county, nor even for sale in that county. That was the evil sought to be ended by the Act of 1907. There was no pretense of evidence, as there could have been none introduced under the information, that the defendant had sold or had attempted to sell any beer to any person in that county, or that he held the cases which he had receipted for as the agent of the Popel & Giller Brewing Company, for sale in Scotland county, or that as agent of the Brewing Company, he held them for delivery to any one in that county. The tendency of the freight receipt, its legal effect, is a consignment, supposing it came from the Brewing Company, by that company to itself, received and receipted for by its agent. In this view of the case, we do not think that the information is good under section 2, of the Act of 1907. It fails to charge that the defendant kept, stored or delivered "for or to another person" any intoxicating liquors. The information is not founded on the first section, which prohibits any person not a licensed dram-shop keeper or by law authorized to sell liquor as a wholesaler, to order for, receive, store, keep or deliver as the agent or otherwise of any other person, intoxicating liquors. The word "agent" does not occur in the second section. The obvious intent of section 2 is to prevent any person from acting as a keeper of what were

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known as "order houses"—of such concerns as are described in the case of *State v. Clow*, *supra*.

Another objection urged to the information is that it is not averred that Popel & Giller Brewing Company of Warsaw, Illinois, is a corporation or a partnership. It would seem, on the authority of the decision of our Supreme Court in the case of *State v. Clark*, 223 Mo. 48, 122 S. W. 665, and the case of *State v. Kelley*, 206 Mo. 685, 105 S. W. 606, and cases there cited, that this is a valid objection, and fatal to this information. These were indictments or informations for larceny or burglary. In all of them it is held necessary, where the name of the owner of the property does not appear to be that of an individual, to aver either a corporation or a partnership, and in the latter case name the partners. We see no reason why this same principle should not be applied in a case of this kind. It is certainly material, when attempting to bring one within the provisions of the Act of 1907, above referred to, if the charge is under the first section, to aver and prove that the defendant acted as an agent, and to aver and prove the name of his principal, and if not an individual, whether that principal was a co-partnership or a corporation. It seems equally clear that where the charge is under the second section and is that the defendant keeps, stores or delivers for or to another person, that the name of that other should be as specific in an indictment or information under section 2, as where the indictment or information is for burglary or larceny. We see no reason to make any distinction between the two classes of cases. On the further ground that the information failed to bring the charge within section 2 of the Act of 1907, we must hold it insufficient. As the instruction given at the instance of the state and before recited followed the information, it must fall with it. If it is true that the Brewing Company named was either a co-partnership or a corporation and located at another place than in the county of Scotland and de-

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sired to ship their goods into Scotland county, not on orders or even for sale there, so far as appears, that concern could only act in that county through an agent, whether it was a partnership or a corporation. The shipper, shipping and delivering to such person from outside of the county into the county could act only through an agent. In such case it practically and really was a shipment and delivery by the consignor to itself as consignee. The statute does not cover such a case. If, after receiving the goods, the defendant had undertaken to keep, store or deliver the goods, for or to another than the owner who had shipped them, he would have brought himself within the penalties of the law.

The judgment is reversed and the cause remanded for such further proceedings as can be had in due course of law. All concur.

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EUGENIA V. TROUT, Appellant, v. WATKINS  
LIVERY AND UNDERTAKING COMPANY, Re-  
spondent.

St. Louis Court of Appeals, May 31, 1910.

1. **LIVERY STABLE KEEPERS: Contract to Transport: Action for Breach: Question for Jury: Facts Stated.** Where a livery stable keeper agreed to transport a sick person from a hospital to her home, and after carrying her to within a few blocks of her home refused to complete the journey on account of bad roads, but offered to take her back to the hospital or to a barn where another conveyance could be obtained to complete the journey, it was for the jury to determine whether the contract was breached and whether the passenger waived her rights by refusing these offers, in view of the fact that a survey was driven over the roads without difficulty and that her physical condition was such that it was impossible for her to endure the strain incident to an acceptance of either alternative.

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2. ———: ———: ———: **Right of Passenger to Recover Fare Paid.** And where, in such a case, the liveryman retains the compensation paid for carriage, the passenger is entitled to recover it, unless she waived her right to have the contract performed.
3. ———: ———: ———: **Pleading: Petition Held to State Cause of Action Ex Contractu.** In an action against a livery stable keeper, plaintiff alleged that while she was a patient at a hospital, she contracted with defendant, a livery stable keeper, to carry her to her home for an agreed consideration which was paid by her; that after carrying her to within five or six blocks of her home, defendant refused to carry her further; that by defendant's failure to carry out his contract, plaintiff became sick and has suffered and will suffer great pain of body and mind and has incurred large expenses for medical service and nursing, all to her damage in a sum stated, and prayed for a judgment in a specified sum for actual damages for the amount paid defendant for transportation, and for a further specified sum as punitive damages. *Held*, that the petition counted entirely on the breach of a contract of carriage and not on an obligation imposed by law, and that the prayer for punitive damages should be disregarded.
4. **CARRIERS OF PASSENGERS: Relation of Carrier and Passenger Created by Contract: Choice of Remedies for Breach.** Generally speaking, the relation of carrier and passenger arises out of contract, express or implied, and the party suffering injury from a breach of it may sue on the contract or he may waive the contract and sue in tort.
5. **DAMAGES: Punitive Damages: Not Allowed for Breach of Contract: Exception.** Punitive damages are not allowed in suits on contract, except for breach of promise of marriage, where it appears the breach was made abruptly and with circumstances of humiliation.
6. **TORTS: Nature and Elements in General: Common Carriers.** As a general proposition, torts are wrongs committed wholly irrespective of contract; but a tort may arise in connection with a breach of contract by a common carrier, where the law lays an obligation upon the carrier to perform his duties in the premises, arising from the contract, and this obligation is breached and in such case there is an obligation imposed both by contract and by law upon the carrier, and the breach of the contract operates as a "tort" though entailing as well a breach of the obligation imposed by law, and the tort though independent of, is in a measure dependent on, the contract.
7. **COMMON CARRIERS: Breach of Contract: Damages: Punitive Damages Allowed When.** Punitive damages are allowed

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for a breach of duty by a common carrier only when the action proceeds as for the tort in violating the obligation laid upon the common carrier by law, and not when the action proceeds for breach of contract.

8. **LIVERY STABLE KEEPERS: Not Common Carriers.** A company engaged in the livery business, which does not hold itself out to serve any and all persons, but operates only under a special contract, and deals with such persons only as it chooses, is in no sense a common carrier.
9. **———: Degree of Care Required to Use.** A liveryman is not under the obligation to use the same degree of care that a common carrier is obliged to use, but he is only required to conduct his calling with the same degree of care and circumspection that is exercised by prudent persons engaged in the same business, and is answerable only for a breach of the slightest obligation which the law imposes upon every person who accepts a human being in bailment, which is the obligation of ordinary care.
10. **CARRIERS OF PASSENGERS: Sick Passengers: Degree of Care Carrier Required to Use.** If a common carrier accepts a passenger known to be sick or enfeebled, it is bound to exercise for his safety a degree of care commensurate with the responsibility assumed, which would be such a degree of care as is reasonably necessary to protect the passenger from injury, in view of his physical condition.
11. **LIVERY STABLE KEEPERS: Sick Passengers: Degree of Care Liveryman Required to Use.** The high degree of care required of a common carrier in the transportation of a sick passenger is not required from a liveryman in transporting such a passenger, but his obligation is to exercise ordinary care.
12. **———: ———: Injury to Passenger by Breach of Duty: Damages: Elements of.** Where a livery stable keeper breaches a contract for the transportation of a sick passenger, he is liable only for such damages as are the natural and proximate result of the breach, but these damages include not only those which are direct, but such as the parties should have reasonably contemplated would be likely to result from a breach when the contract was made, and where the liveryman knew the passenger was sick, he will be liable for damages caused by unnecessary delay and exposure to inclement weather, resulting from his breach of his contract to transport the passenger.
13. **———: ———: ———: Action Ex Contractu or Ex Delicto: Form of Action: Immaterial.** The obligation of a liveryman to use ordinary care in the transportation of a passenger is

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not enjoined by law, but is an implied term in his contract, and in a suit for damages, caused by failure to perform his contract, he may be held responsible for failure to use ordinary care, whether the action be *ex contractu* or *ex delicto*.

14. ———: ———: ———: Action Ex Contractu: Contributory Negligence of Passenger. A person who has hired a liveryman to carry him between two points in a city, and sues for damages for breach of the contract, cannot recover damages which might have been avoided but for his own contributory negligence, whether the suit is on the contract or in tort.
15. ———: ———: ———: Damages: Damages Held not too Remote: Facts Stated. Plaintiff, while ill at a hospital, employed defendant, a livery stable keeper, to carry her to her home. Defendant was not informed that plaintiff was ill, but the driver in charge of the carriage saw on her entering the carriage that she was ill and very feeble. Defendant carried plaintiff to within five or six blocks of her home, and then because of the condition of the streets, refused to complete the journey. Plaintiff thereupon sent a message to a friend, who, after a delay of an hour, or more, came after her with an open carriage. Held, that the damages resulting from plaintiff's catching cold because of defendant's breach of contract, and the expenditures occasioned thereby, were not too remote for recovery, whether the action was on the contract or in tort.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. H. Williams, Judge.*

REVERSED AND REMANDED.

*John E. Turner* and *Joseph A. Wright* for appellant.

(1) The cause of action was properly pleaded, it being in tort and arising from a breach of a contractual obligation. *Everett v. Railroad*, 214 Mo. 54; *O'Brien v. Transit Company*, 212 Mo. 59. (2) Without the contractual relation existing between the parties, the critical condition of the appellant's health, of itself, imposed an obligation on respondent commensurate with the dangers to which she was exposed. *Depue v. Flateau* (Minn.), 111 N. W. 1; *Ploof v. Putnam* (Vt.), 71 Atl. 189. (3) Although a livery stable keeper is not a common



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carrier for hire, he is nevertheless liable for his negligence. *Siegrist v. Arnot*, 10 Mo. App. 197; *Siegrist v. Arnot*, 86 Mo. 200; *Lemon v. Chanslor*, 68 Mo. 340; *Jamiet v. Storage and Moving Company*, 109 Mo. App. 257; *Livery and Undertaking Co. v. Busson*, 58 Ill. App. 1; *Fisher v. Tyron*, 15 Ohio C. C. 541; *Lewark v. Parkinson*, 73 Kas. 533, 5 L. R. A. (N. S.) 1069. (4) The appellant is also entitled to recover the amount paid by her for the carriage. *Lewark v. Parkinson*, 73 Kas. 553, 5 L. R. A. (N. S. ) 1069; *Gatzow v. Buening*, 106 Wis. 1, 49 L. R. A.; *Norrington v. Wright*, 115 U. S. 188. (5) The court erred in refusing to admit evidence as to the plaintiff's illness, and prior and subsequent health. *Walsh v. Railroad*, 102 Mo. 582; *Weisse v. Remme*, 140 Mo. 289; *Railroad v. Hyatt*, 12 Tex. Civ. App. 435, 34 S. W. 677; *Looran v. Railroad*, 6 N. Y. Sup. 504; *State v. Main*, 69 Conn. 123; *Boucher v. Larachelle*, 68 Atl. (N. H.) 870.

*S. T. G. Smith* for respondent.

NORTONI, J.—This is an action for damages alleged to have accrued through a breach of a contract of carriage. At the conclusion of the evidence for plaintiff the court instructed a verdict for defendant and plaintiff prosecutes the appeal.

For the information of those who may care to examine it, we set forth the petition, which, omitting caption, is as follows:

"Plaintiff for her cause of action against defendant, states:

"That defendant is now and was at all times hereinafter mentioned, a corporation, duly organized and existing under the laws of the State of Missouri and engaged in the livery business and of supplying carriages for hire, in the city of St. Louis, State of Missouri.

"That on or about the 12th day of February, 1908,

and while plaintiff was at the Evangelical Deaconess Hospital, at the northwest corner of Sarah street and West Bell avenue, in the city of St. Louis, Missouri, where she had been under treatment for sickness, plaintiff and defendant entered into a contract by the terms of which defendant agreed in consideration of \$2, then and there paid by her to defendant to convey her in a carriage from the said hospital to her home, at No. 5551 Greer avenue, in the city of St. Louis, Missouri.

"That on said date the plaintiff entered defendant's carriage thus contracted for, and defendant, by its agent and servant, the driver thereof, undertook and started to take and convey the plaintiff to her said home, and that at or near the corner of Terry and Clara avenues, in the said city of St. Louis, Missouri, the said defendant, through its agent and servant, the said driver, and while acting within the scope of his duties, stopped the horses and then and there willfully and wantonly, and in breach of its said contract, stopped said carriage and abandoned its said contract, and refused to convey plaintiff any further, and left the plaintiff at said point. That at the time of making of said contract and while the plaintiff was being driven to her home, and at the time of the abandonment of said journey, defendant knew that the plaintiff was sick, was incapable of caring for herself, on account of her illness and of the dangers to which she would be exposed by reason of the abandonment of said contract.

"That by reason of the said willful and wanton acts of the defendant, plaintiff became seriously sick and ill; that she has suffered, and will in the future suffer great pain of body and mind; she has incurred and become obligated for and will in the future incur and become obligated for large expense for medical services, medicines and nursing, all to her damage in the sum of \$2200.

"Wherefore, premises considered, plaintiff prays judgment against defendant for the sum of \$2200 actual

damages, and for the said sum of Two (\$2) Dollars, which plaintiff alleges defendant has not refunded and is still due her and unpaid, and for the sum of \$2200 as punitive or exemplary damages, to serve as a warning to others against the perpetration of like or similar acts."

It appears plaintiff, who is a widow, had recently undergone an operation for appendicitis in the Evangelical Deaconess Hospital and, having recuperated sufficiently, engaged defendant, who is a liveryman, to convey her to her home in the northwest part of the city. We gather from the testimony that plaintiff resided about fifty-six hundred west and thirty hundred north in the city of St. Louis. At the time in question, the streets in that part of the city were not sufficiently improved to prevent an accumulation of mud and pools of water during the wet season. Plaintiff underwent the operation for appendicitis in the latter part of January and had been confined in the hospital about three weeks as a result thereof when the physician in charge advised she was sufficiently recovered to return home. Upon being so advised, she caused an attendant at the hospital to communicate to the defendant livery company that she desired to be conveyed by them in a carriage to her home. At the time appointed, defendant sent one of its carriages in charge of a colored driver to the hospital and plaintiff paid him two dollars in advance for the transportation to her residence, giving the number. Plaintiff was assisted down the steps of the hospital and to the carriage by a nurse and her sister. Upon entering the carriage she personally paid the driver and he was instructed as to her destination. After having progressed to within five or six blocks of plaintiff's residence the driver stopped the carriage and notified her that it would be impossible for him to complete the journey in view of the muddy condition of the streets. It appears the carriage employed was inclosed and had swinging doors on either side. Furthermore, it was a

heavy vehicle the bottom of which approached to within fourteen inches of the ground. For a considerable distance, and indeed all of the way, except the last few blocks, the streets were solid enough but, as stated, the streets were unmade and muddy for probably six or eight blocks of the road next to plaintiff's residence. The carriage had passed through several mud holes of considerable proportions when the driver notified plaintiff and her sister that he would not complete the journey.

Having reached a point five or six blocks distant from plaintiff's home, the driver opened the door of the carriage and notified both plaintiff and her sister that because of the condition of the streets he would not further proceed and inquired if plaintiff could not walk the remainder of the way. At this time both plaintiff and her sister informed him that it was utterly impossible for her to walk in view of the enfeebled condition entailed by her sickness and the operation which had theretofore been performed. Besides so informing the driver, they suggested that he might procure another conveyance and complete the transit. On this suggestion being made, the driver left them in the carriage and repaired to a telephone where, as he said, he communicated the situation to his employer, the defendant. After having communicated with defendant over the telephone, the driver returned to the carriage and informed plaintiff and her sister that the "boss" said for him to return them to the hospital and not attempt to proceed further through the mud. This alternative being presented, both plaintiff and her sister objected and said that in view of plaintiff's sick and enfeebled condition she was not able to take the long drive back to the starting point. It seems plaintiff was suffering more or less at the time from the frequent jars and jerks received in the transit. Plaintiff and her sister again requested the driver to procure a lighter conveyance and continue the journey as it would be impossible for

plaintiff in her condition to return to the hospital. At the conclusion of the conversation, the driver repaired a second time to the telephone and consulted his employer as to what should be done in the premises. He returned in a few minutes and informed plaintiff that the "boss" said for him to bring plaintiff to defendant's livery barn and there transfer her into a storm buggy by means of which she would be conveyed to her home. Plaintiff and her sister again told the driver that the same reasons would prevent her from returning with him to the livery barn that prevailed against returning to the hospital; that is to say, that her condition was such she was unable to withstand the strain of the trip. It was insisted the driver should complete the conveyance from that point to plaintiff's home by some other means but the driver answered he couldn't do anything but take the parties back to the livery barn as suggested.

There is testimony to the effect as well that the driver slammed the door of the carriage and addressed the ladies rather roughly in closing these negotiations. It appears after having thus twice insisted that some conveyance should be furnished there to complete the transportation and the abrupt or "ill remarks" (as they are termed in the testimony) of the driver, plaintiff and her sister desisted from further efforts in that behalf and employed a boy who conveyed a message to a friend informing him of their predicament and that this friend, the family grocer, came to their relief in the course of an hour with a one-horse surrey. The parties were allowed to sit in defendant's carriage while waiting for their friend to come with the surrey. After his arrival, plaintiff was assisted into the surrey, which was an open conveyance, and conveyed to the house of her next door neighbor where she was immediately seized with a chill. The date of the occurrence was February 12th, at a season of the year when the weather was cold and moist,

though the particular day in question was a pleasant one for the season.

The evidence tends to prove that because of the delay of one hour occasioned by defendant's breach of its contract, during which time plaintiff sat in the cold carriage, and because of her subsequent exposure in being transported in an open conveyance, plaintiff caught a severe cold which resulted in a protracted illness. There is testimony, too, to the effect that plaintiff was seized with a chill immediately after being taken to the home of her neighbor and that because of her enfeebled condition such chill may have resulted from the exposure and excitement incident to the conduct of defendant's servant in breaching the contract of carriage.

From what appears in the record and briefs, we believe the court directed a verdict for defendant on the theory that plaintiff voluntarily waived her right to insist upon a completion of the contract of carriage. Indeed, on the argument at bar, we were impressed with this view, for the facts were most ingenuously stated by counsel, but upon looking carefully into the proof, it appears plaintiff insisted fully upon her right to have the contract performed and that defendant utterly refused except upon the condition that she should consent to return to the livery barn from which place a new start would be made in another conveyance. The first alternative submitted to plaintiff by the driver, after having communicated with defendant's office over the telephone, was to the effect that the driver should return plaintiff to the hospital. Of course, this in no manner would discharge it of its obligation to carry her to her residence within a reasonable time if such were possible by the exercise of ordinary diligence and that such was possible at least by procuring another conveyance is beyond question, for it appears the groceryman had no difficulty in passing over the identical streets with a one-horse surrey. The second alternative offered to plaintiff after communication between the

driver and defendant was to the effect that plaintiff should accompany the driver to the livery barn, far removed from the point in question, and there be transferred into another conveyance by which the transit should be completed. It may be conceded, generally speaking, that the obligation of defendant required no more than the exercise of ordinary diligence on its part for the safety of the passenger and to complete the transportation within a reasonable time. But the plaintiff was sick and in a greatly enfeebled condition. This fact was obvious to the driver when the contract was made and what would amount to the exercise of ordinary care in such circumstances is quite different from what would suffice to discharge the same obligation as to a passenger enjoying sound health and a vigorous constitution. The alternative submitted to plaintiff that she should go with the driver to the livery barn amounted, no doubt, to no alternative at all in the circumstances of the case, for, as she said, it was utterly impossible for her to endure the strain incident to such an arrangement. Considering the circumstances of the case together with the fact that plaintiff insisted and continued to insist upon the driver procuring some sort of a conveyance and completing the transportation, we believe the question as to whether or not defendant breached the contract or plaintiff waived her rights with respect to the matter should have been submitted to the jury. According to the testimony, it was not until after the driver "made use of some very ill remarks; said that he couldn't do anything but take her back there, and slammed the door of the carriage" that plaintiff sought another conveyance. These facts certainly do not indicate that plaintiff voluntarily waived her rights under the contract, and the direction of a verdict for defendant may not be sustained on any other theory. Furthermore, it appears that defendant retained the two dollars paid for the carriage. Unless plaintiff waived

her right to have the contract performed, she is entitled to recover the price.

The form which the proceeding has assumed and its proper disposition in the future presents several questions so nearly approaching the line of demarcation which is maintained throughout our jurisprudence between actions *ex contractu* and actions *ex delicto* for the same wrong, that it will be essential to examine the relevant principles of law to the end the doctrines of liability may not be confused. It is argued by plaintiff that although the petition alleges a breach of the contract of carriage the suit is really in tort. This argument is material in view of the fact the petition contains a prayer for punitive damages and the character of the action presents other questions touching the measure of recovery. We have examined the authorities relied upon by plaintiff in support of this proposition and they may be put aside in so far as this case is concerned for the reason they are wholly foreign to the issue presented in the present petition. The rule of those cases is that where the suit against the carrier proceeds as for a breach of its obligation imposed by law and charges the act to have been negligently done, the force and effect of the allegation of negligence is not annihilated and destroyed by averring wilfulness and wantonness as well. No such question arises on the record here, for if we are to accept plain English words and accord to them their ordinary meaning and significance, the present petition counts entirely on the breach of a contract of carriage and in no respect upon the obligation of the carrier imposed by law. [3 Ency. Pl. and Pr., 821, 822.] Generally speaking, it is true the relation of passenger and carrier arises out of contract either express or implied, and the party suffering injury from a breach of such a contract or of the obligation which the law imposes as a sequence thereto may have his choice of remedies. If he desires he may sue for a breach of the contract of carriage. In those cir-



cumstances the suit is of course *ex contractu* and proceeds in accordance with the principles of contract law. On the other hand, he may waive the contract and sue in tort for the wrongful breach of the obligation imposed by law. In those circumstances, the suit is of course *ex delicto* and proceeds in accordance with the law of torts. [Canady v. United Rys. Co. of St. Louis, 134 Mo. App. 282, 114 S. W. 88; 2 Hutchinson on Carriers (3 Ed.), sec. 962; 1 Cooley on Torts (3 Ed.), 155, 156, 159.] It appears plaintiff saw fit to waive her right to sue in tort and proceeded as for a breach of contract. A mere reading of the petition evinces such to be the fact beyond question. This being true, the prayer of the petition for punitive damages is to be disregarded, for exemplary or punitive damages are not allowed in suits on contracts except for breach of promise of marriage, when it appears the breach was made abruptly and with circumstances of humiliation. Indeed, the law is not concerned with the motive of a party for breaching a contract as it intends only to alleviate the circumstances of each case on the principles of compensation for the loss. [2 Sedgwick on Damages, 370; 2 Sedgwick on Damages, secs. 601, 602, 603; 8 Am. and Eng. Ency. Law (2 Ed.), 632 to 635, 639; 2 Sutherland on Damages (3 Ed.), sec. 390.] It is sometimes asserted that there are other exceptions besides breach of promise of marriage which permit a recovery for punitive damages with respect to breaches of contract but, as said by Mr. Sutherland, this is in no degree accurate. Such cases are in fact actions brought upon the theory that legal rights growing out of a contract have been violated or legal duties resting thereon neglected. Indeed, those actions are usually such as proceed for a tort dependent upon contract, as for a breach of the obligation of the carrier imposed by law which may exist wholly irrespective of a contract, and in no sense for a breach of the contract itself as in this case. [1 Sutherland (3 Ed.), 98, 99.] As a general proposition torts are con-

sidered to be wrongs wholly irrespective of contracts. [1 Cooley on Torts (3 Ed.), 3.] But there are cases where the tort comes into being as a result of the breach of a contract, as, for instance, where there is a contract of carriage with a common carrier and it is breached. In such circumstances the breach of contract gives rise to the tort, not, however, because it was wrong to breach the contract, but only because the law laid an obligation upon the carrier to perform his duty in the premises and he had breached the obligation imposed by law which in the particular instance arose from the relation created by contract. In such cases where there is an obligation imposed both by contract and by law upon the carrier and the breach of the contract operates a tort through entailing as well a breach of the obligation imposed by law, it is sometimes said the tort, though independent of, is, in a measure, dependent upon the contract. It is in this view generally speaking that punitive damages are allowed as for a tortious breach of the contract but in truth and in fact it amounts to no more than an allowance of such damages in proper circumstances for a breach of the obligation imposed by law. [1 Sutherland on Damages, sec. 99; Addison on Torts (8 Ed.), 15, 16.] For a further distinction with respect to torts independent of and yet in a measure dependent upon contracts, see *Shirley v. Waco Tap. Ry. Co.*, 78 Tex. 131, 144, 145, 10 S. W. 543; *Rich v. New York Central, etc., R. Co.*, 87 N. Y. 382. The theory of the law as to common carriers in this regard is said by Mr. Sedgwick to be that the case involves more than the mere breach of contract but operates a tort as well. [2 Sedgwick on Damages, sec. 859.] However, even in such cases, punitive damages are allowed only when the action proceeds as for the tort and not when it proceeds, as in this case, for breach of contract.

Defendant, in this case, is in no sense a common or public carrier of passengers but, on the contrary, is the keeper of an ordinary livery stable. It does not hold

itself out to serve any and all persons whomsoever, but, instead, operates under a special contract and deals with such persons only as it chooses, identically as does the private carrier for hire in respect of goods. From this it is obvious that the obligation which attends its calling is not that of high care which obtains as to the public or common carrier of passengers. Of such livery stable keepers Mr. Hutchinson says:

"Ordinarily, livery stable keepers, engaged in the business of letting for hire teams and vehicles, either with or without drivers, are not carriers of passengers within the legal meaning of that term. They do not hold themselves out as undertaking for hire to carry indiscriminately any person who may apply. Those who hire their vehicles are not necessarily restricted to vehicles or drivers designated by the proprietor, but may, in a measure, protect themselves by selecting the particular horse or driver they wish to hire. The duties and obligations of carriers of passengers, are, therefore, not applicable to mere livery stable keepers." [1 Hutchinson on Carriers (3 Ed.), sec. 96].

Although the hackman and stage coach proprietor are regarded as public carriers and answerable for high care as such, this rule does not obtain with respect to an ordinary liveryman. [Lemon v. Chanslor, 68 Mo. 340; Leward v. Parkinson (Kan.), 85 Pac. 601, 5 L. R. A. (N. S.) 1069; see also Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106.] Liverymen are required to conduct their calling with the same degree of care and circumspection which is exercised by prudent persons engaged in the same business and are answerable only for a breach of the slightest obligation which the law imposes upon every person who accepts a human being in bailment; that is, the obligation of ordinary care. [Siegrist v. Arnot, 10 Mo. App. 197; Siegrist v. Arnot, 86 Mo. 200; Stanley v. Steele, 77 Conn. 688; Payne v. Halstead, 44 Ill. App. 97; Copeland v. Draper, 157 Mass. 558; Erickson v. Barber Bros., 83 Ia. 367.] From this

it appears that besides undertaking to convey plaintiff to her destination within a reasonable time the contract of carriage entailed an obligation on defendant to exercise ordinary care for her safety during the transit. Indeed, even a private person who undertakes to transport others voluntarily, without either contract or recompense, is required to exercise ordinary care for their safety, for because of the character of the bailment the law permits nothing less. [Siegrist v. Arnot, 86 Mo. 200; Siegrist v. Arnot, 10 Mo. App. 197.] In speaking of the duty of private individuals with respect to carrying persons without a contract, Judge Cooley says:

"If a person volunteers, through himself or his servants, to transport others by modes or under circumstances calculated to expose them to danger, he should be held to assume the duty of care in so doing, and the duty to make compensation, in case he should become the instrument of a negligent injury to his charge." [1 Cooley on Torts (3 Ed.), 242.]

Furthermore, it has been declared by courts of high authority that the precepts of humanity alone, unattended by any other obligation whatever, enjoins the duty of ordinary care upon one knowing the condition of a sick person to look out for the safety and welfare of those who are thus enfeebled. [Depue v. Flateau (Minn.), 111 N. W. 1; Ploof v. Putnam (Vt.), 71 Atl. 188, 189.] And the rule obtains with respect to common or public carriers of passengers to the effect that if the carrier accepts a passenger known to be sick or enfeebled, it is bound to exercise for his or her safety a degree of care commensurate with the responsibility assumed and that is such care as is reasonably necessary to protect the passenger from injury, in view of his or her physical condition. [2 Hutchinson on Carriers (3 Ed.), sec. 992; Mathew v. Wabash R. Co., 115 Mo. App. 468, 78 S. W. 271, 81 S. W. 646; Hanks v. C. & A. R. Co., 60 Mo. App. 274; Young v. Mo. Pac. R. Co., 93 Mo. App. 267; see also Phillips v. St. Louis & S. F.

R. Co., 211 Mo. 419, 111 S. W. 109.] But the same high degree of care is not required from the liveryman. His obligation is to exercise ordinary care in the circumstances of the case identically as is that of a carpenter, a builder, a physician or others engaged in trades or professions which imply and require a measure of skill. There can be no doubt defendant's driver knew the condition of plaintiff at the time the contract of carriage was breached even though the fact that she had recently had an operation performed was not communicated at the time it was made, for it appears that both plaintiff and her sister repeatedly told the driver of her condition when he requested her to walk the several blocks to her home. If this suit were in tort, it would be competent to consider the rights of the parties from the standpoint of the knowledge which defendant's driver had of plaintiff's condition at the time he refused to complete the transportation. But as it is in contract, the defendant is liable to respond only for such damages as are the natural and proximate result of the breach. This includes besides direct damages such as the parties should have reasonably contemplated would be likely to result from a breach when the contract was made. [3 Hutchinson on Carriers (M. & D.) (3 Ed.), 1358; Hadley v. Baxendale, 9 Exch. 341.] However, though the fact plaintiff had recently undergone an operation was not then communicated, it conclusively appears that defendant's agent, the driver, knew she was sick and enfeebled when the contract of carriage was made, for the evidence is, that plaintiff was unable to walk alone and the nurse and her sister assisted her down the hospital steps into the carriage in the very presence of the driver. In view of these facts, the obligation of defendant to exercise ordinary care for plaintiff's safety must be construed as though defendant knew its passenger was a sick lady and susceptible to the inclemency of the weather, especially when accentuated by circumstances of excitement which attended

the act of the driver in roughly speaking to her and slamming the door of the carriage.

But it is said the question of ordinary care is beside the case for the reason the suit is on the contract and not on the obligation the law enjoins. This suggestion is inaccurate in principle in that it assumes a false premise as though there is in the relation here involved an obligation imposed by law in the true sense of that term. In the case of a private carrier, there is no obligation imposed by law as obtains on the custom of the realm with respect to the public or common carrier, for such private carriers operate only in accordance with their contract of hire, whereas the public carrier owes a public duty by law which must be performed in favor of one and all alike. However, there is a term in every contract of even a private carrier which is implied by the law to the effect that he shall exercise ordinary care for the safety of his charge. Instead of this being the obligation imposed by law in the sense of those words as applied to public carriers, it is but one term (*i. e.*, an implied term) of the contract which the carrier entered into with the plaintiff. Such implied term of the contract, as contradistinguished from the obligation of the law alone may, of course, be invoked in a suit on the contract, for it is one of the matters stipulated for therein though not expressed in words. [State ex rel. v. Laclede Gas Light Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383; 22 Am. St. Rep. 7, 8, 9; 7 Am. and Eng. Ency. Law (2 Ed.), 91; 15 Am. and Eng. Ency. Law (2 Ed.), 1095, 1096.] It is entirely clear that the contract in this instance as much required the defendant to exercise ordinary care for plaintiff's safety as it enjoined the duty to make the transit in a reasonable time or make it at all for that matter. In so far as the obligation of the contract is concerned, the form of the remedy is immaterial, for whether the actions proceeds *ex contractu* or *ex delicto* the rights of the parties stipulated or assured in the contract are to be determined

by the same standard. The form of the action concerns the remedy only and in no sense affects the legal obligation of the parties. It is, therefore, clear that though the suit is in contract, the defendant must respond thereon in accord with all of the terms of its undertaking, either express or implied. But as before suggested, though the form of the action is unimportant as to the scope of the contract as a general rule the measure of damages, or scope of recovery, is more extensive when the action proceeds in tort. In other words, when the suit proceeds as for a breach of the contract the pertinent rules for admeasuring the damages confine the relief to narrower limits. [1 Hutchinson on Carriers (M. & D.), sec. 204; Dale v. Hall, 1 Wilson 281; Dyke v. R. Co., 45 N. Y. 113, 6 Am. Rep. 43.] An investigation of this question reveals that the very first case reported in the books where the action assumed the form of one on contract against a public carrier and sought damages for the breach, instead of proceeding in tort on the custom of the realm, the court considered and gave judgment for damages upon the contract as though it was defendant's duty to exercise ordinary care in the premises. Indeed, it is said in that case though the suit was on the contract and the plaintiff offered no affirmative proof of negligence, the defendant's failure to exercise due care in the circumstances of the case should be affirmed for the reason the law supplied such an obligation in the contract. See Dale v. Hall, 1 Wilson 281; see also Evansville, etc., R. Co. v. Kyte, 6 Ind. App. 52. It is true that the case differs from this in the fact that it proceeded against a common carrier, on whom the law imposed an obligation on the custom of the realm because of the nature of the calling, but nevertheless the action was in contract as here and in this case the law supplies the same obligation in a different form by incorporating it as an implied term of the contract instead of imposing it as an incident to the calling, as in the case of a public carrier.

The fact the petition avers a willful and wanton breach of the contract is immaterial in so far as the right of the plaintiff is concerned, for defendant having assumed the contractual obligation to exercise ordinary care for her safety, she should be recompensed for such injuries as naturally result from the breach, or such as were within the contemplation of the parties at the time the contract was made though the breach was either designedly done with wantonness or because of sheer carelessness. If plaintiff's rights under the contract were violated, it is wholly unimportant to her whether defendant was negligent and remiss in the performance of its duty from inattention or whether it intended the result and acted willfully to that end. It has recently been decided by the Supreme Court that a breach of the obligation to exercise ordinary care may be shown under an allegation of willfulness and wantonness as well as under one of negligence. See *Everett v. St. Louis & S. F. R. Co.*, 214 Mo. 54, 84, 85, 112 S. W. 486.

But it is said that to consider the question of defendant's failure to exercise ordinary care for this sick lady passenger will as a correlative thereof permit the introduction of evidence tending to prove contributory negligence on the part of plaintiff and thus introduce an anomaly to the effect that contributory negligence may be put forward as a defense in a suit on contract. In answer to this, it may be said that a precedent obtains in this court on facts very similar to these before us where in a suit for the breach of a contract of carriage the plaintiff's recovery was denied on the ground of her contributory negligence. See *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7. The Supreme Court of Massachusetts, too, seems to entertain the view that in suits *ex contractu* for the breach of a contract of carriage the plaintiff's negligence contributing to the injury may be shown in defense. See *Ingraham v. Pullman Co.*, 190 Mass. 33. The thought seems to run throughout the authorities that where the suit is either in contract or in



tort for damages entailed because of the carrier's failure to complete the transportation the conduct of the plaintiff proximately contributing to the injury should be considered. Mr. Hutchinson says:

"Where, therefore, the carrier has wrongfully set the passenger down short of his destination or has carried him beyond it, and has thereby imposed upon him the necessity of getting to his destination by other means, the carrier must respond, whether the action be brought for the breach of the contract or for the tort, if the passenger, while in the exercise of reasonable care and prudence for his safety, has received an injury while seeking to extricate himself from the situation in which the carrier has thus wrongfully placed him." [Hutchinson on Carriers (3 Ed.) (M. & D.), sec. 1429.]

The thought to be gleaned from this expression as to the carrier's liability when the action proceeds either in contract or tort is that if the injury results because of the negligence of the plaintiff in contributing thereto no recovery should be allowed. As before stated, the case of *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7, heretofore cited, was a suit as for a breach of the contract of the carrier to complete the transit undertaken by transporting plaintiff to her home, and the right of recovery was denied as for her contributory negligence in unnecessarily exposing herself to inclement weather. The authority is directly in point and a precedent of our own on this feature of the case.

But it is suggested the action being on the contract and not in tort, the damages occasioned because of plaintiff's catching cold, etc. are remote and not recoverable in an action as for a breach of the contract. The case of *Hobbs v. London, etc., R. Co.*, L. R. 10, Q. B. 111, is relied upon in support of this argument. That case, though an action in tort, was treated by the court as if it proceeded for a breach of contract, and it was ruled that the consequential damages prayed for on account

of sickness and medical attention entailed from the fact that the passenger was required to walk and caught cold after the contract of carriage was breached was remote. It may be said, however, from all that appears that the passenger in the instance there involved was in sound health at the time the contract was made and nothing indicated that such damages were reasonably probable to have been within the contemplation of the parties when entering into the contract. But be this as it may, the rule of that case has been departed from in England and its doctrine repudiated in *McMahon v. Field*, 7 Q. B. Div. L. R. 591. Though some courts have adopted its doctrine in America, others have declined to do so. In fact it is repudiated and said to be unsound by the leading text writers on the subject as will fully appear by reference to *Sedgwick on Damages*, sections 867, 868, 869, 870, 871. Mr. Hutchinson also suggests its infirmity and says that in most of the American states its doctrine has been restricted to the extent that it is not applied if the breach of the contract to carry in itself amounts to a tort. [Hutchinson on Carriers (3 Ed.) (M. & D.), sec. 1429.] However, as to this matter, the *Hobbs* case may be distinguished from the one now in judgment for the reason that here it clearly appears the plaintiff was a sick lady and so known by both parties to be at the time the contract of carriage was entered into. It is true she omitted to inform the driver before going into the carriage that she had recently been operated on for appendicitis but it appears he was present when the nurse and her sister aided her from the hospital door into the carriage at which time she paid him the fare. Plaintiff's sick and enfeebled condition at the time the contract was made was obvious to the driver and this fact invokes the rule of *Hadley v. Baxendale*, 9 Exch. 341. This fact, too, distinguishes plaintiff's case from that of *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7, in which the court remarked plaintiff's damages were too remote for a re-

covery in an action on contract. In that case it appears though the plaintiff was of delicate constitution that she was in good health and nothing indicated to the carrier that special damages on account of the passenger contracting cold might ensue from a breach of the contract. The rule of *Hadley v. Baxendale* was not considered by the court in that case for the reason the facts did not invoke it. However, when the action is either in contract or tort, the sound rule requires the wrongdoer to answer for the natural and proximate results of his acts and it would seem plaintiff's grievance is a natural and proximate result of the breach of the contract in the circumstances above adverted to. [8 Am. and Eng. Ency. Law (2 Ed.), 583; 2 Sedgwick on Damages, 871; 3 Hutchinson on Carriers (3 Ed.), sec. 1358; *McMahon v. Field*, 7 Q. B. Div. L. R. 591.] But if, as said, the major portion of the damages sought to be recovered are special and consequential, in that they result from a sickness contracted and expenditures occasioned as a result of the exposure to which plaintiff was subject on account of the breach of the contract, a recovery may be had in accordance with the established rule for admeasuring damages for breach of contract. The rule of *Hadley v. Baxendale* requires that the facts relied upon to support the consequential damages must be communicated at the time of making the contract, to the end that it may appear the parties held such consequences as within their reasonable contemplation. [Hutchinson on Carriers (3 Ed.) (M. & D.), sec. 1358.] It appearing defendant's driver knew plaintiff was in a sick and enfeebled condition of health at the time she paid him the two dollars for her transportation home, it may be declared that the parties essentially contemplated the transportation of a passenger who was susceptible to the baneful effects of exposure in inclement weather as well as to excitement incident to unkind words. Even if such damages are not the natural and probable result of a breach of the contract to

carry a sick woman in inclement weather, the proof referred to satisfies the rule of *Hadley v. Baxendale*, 9 Exch. 341 for the prima facie purposes of the case and it should be proceeded with accordingly. [*Sedgwick on Damages*, sec. 871; *Hutchinson on Carriers* (3 Ed.), sec. 1421.]

The judgment should be reversed and the cause remanded. It is so ordered. All concur.

HENRY SCHAFER, Respondent, v. HENRY OSTMANN, Sr., and WILLIAM OSTMANN, Appellants.

St. Louis Court of Appeals, May 31, 1910.

1. **ASSAULT AND BATTERY: Civil Action: Two Defendants: Concert of Action Prerequisite to Joint Liability: Instructions.** In an action against two defendants for an assault and battery, an instruction as to each defendant, permitting recovery against him alone, whether he acted independently or in concert with his co-defendant, but omitting to inform the jury that a joint verdict could not be given against both defendants unless there was concert of action between them, was erroneous.
2. ———: ———: ———: ———. In cases of willful tort, as assault and battery, there is no joint liability, unless there is concert of action between those who are charged jointly.
3. ———: ———: ———: ———: **Instructions: Error not Cured by Other Instructions.** In an action for assault and battery, instructions permitting recovery against each defendant if he acted independently, and omitting to inform the jury that no joint verdict could be given against both defendants unless there was concert of action between them, were not cured by an instruction that humiliation and disgrace were competent matters to be considered, if caused by the acts of defendants acting independently or in concert, and that if the assault was made by defendants in concert, or either of them, exemplary damages could be allowed, etc., for by this instruction the jury were given to understand that in computing damages it was immaterial whether defendants acted in concert or independently.
4. ———: ———: ———: ———: ———: ———. Nor were said instructions cured by an instruction directing the form of verdict to be returned if it was found that the two defendants acted in concert and maliciously made the assault, there being

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Schafer v. Ostmann.

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nothing in the instruction to inform the jury that in no instance would it be proper for them to allow a joint recovery against defendants in the absence of it appearing they acted in concert.

5. **DAMAGES: Exemplary Damages: Allowed When.** Exemplary or punitive damages are allowed in actions of tort, accompanied with circumstances of malice, wantonness, etc.
6. **EVIDENCE: Tort Actions: Malice and Wantonness Shown: Pecuniary Circumstances of Defendant May be Proved: Damages.** In an action of tort, accompanied with circumstances of malice, wantonness, etc., it is competent to show the financial standing of defendant, to the end of meting out a proper punishment.
7. **ASSAULT AND BATTERY: Joint Liability: Evidence: Damages: Pecuniary Circumstances of One Defendant not Admissible.** In an action for assault and battery against two defendants jointly, evidence of the pecuniary condition of one of the defendants alone is not admissible.

Appeal from Lincoln Circuit Court.—*Hon. James D. Barnett, Judge.*

REVERSED AND REMANDED.

*R. L. Sutton and Wm. H. Clopton* for appellants.

(1) The court erred in refusing to instruct the jury that there could be no recovery for punitive damages, for the reason that the petition itself does not allege either malice or wantonness. (2) Plaintiff's instructions numbers 2 and 3 are erroneous in that they authorize a verdict against Henry Ostmann, Sr., without regard as to whether or not he acted in concert with his co-defendant. Instruction number 4 is erroneous in that it authorizes a verdict against defendant, William Ostmann, without regard as to whether or not he acted in concert with his co-defendant. Instruction number 5 is erroneous in that it directs the jury that if they find for the plaintiff, they should award him damages for all injuries suffered by him, caused by the acts of defendants acting independently, or in concert. All of said instructions taken together are erroneous in that, when read together as a whole, they authorize a joint verdict against both the defendants without regard to whether

they acted in concert or not in making the assault. An assault and battery is an intentional wrong, and there cannot be a joint verdict against defendants unless they conspired and co-operated with each other in making the assault. *Thomas v. Werremeyer*, 34 Mo. App. 668; *Barton v. Barton*, 119 Mo. App. 531; *Leavell v. Leavell*, 114 Mo. App. 25; *Leavell v. Leavell*, 122 Mo. App. 654; *Nichols v. Nichols*, 147 Mo. 387; *Williams v. Sheldon*, 10 Wend. 654; *Watt v. Ogden*, 12 Wend. 39; *Weakley v. Roger*, 3 Watts 460; *Frantz v. Lenhardt*, 56 Penn. St. 365; *State v. Jones*, 83 N. C. 605; *Lamb v. People*, 96 Ill. 73; *Hill v. Combs*, 92 Mo. App. 251; *Graham v. Ringo*, 67 Mo. 326. (3) The court erred in admitting evidence of the wealth of the defendant, Henry Ostmann, Sr., and in directing the jury by instruction number 6 that they could take into consideration the pecuniary condition of the parties to the suit in estimating punitive damages. The plaintiff sought and obtained a joint verdict against both defendants, and it was not proper for the jury to be permitted to consider the wealth of one of the defendants as against the other. Plaintiff having voluntarily joined several defendants, he must be held to thereby waive any right to recover punitive damages against both founded upon the ability of one of the defendants to pay them. *Leavell v. Leavell*, 114 Mo. App. 34; *Gas Co. v. Lansden*, 172 U. S. 534, 552; *Smith v. Wunderleich*, 70 Ill. 426; *Railroad v. Smith*, 57 Ill. 507; *McCarthy v. DeArmit*, 99 Pa. St. 63; *Nichols v. Nichols*, 147 Mo. 387. (4) Plaintiff's instruction number 5, on the measure of damages, is erroneous in that it directs the jury to find punitive damages against both defendants, if they believed the assault made by one or both of them was maliciously made. This is a clear instruction to the jury to find punitive damages against both defendants in case either one of them acted maliciously, regardless of whether they acted in concert or not. *Boutwell v. Marr*, 71 Vt. 1; *Pardridge v. Brady*, 7 Ill. App. 639; *Hair v. Little*, 28

Ala. 236; McCarthy v. DeArmit, 99 Pa. St. 63. (5) Plaintiff's instruction number 6 is erroneous in that it commissions the jury to consider the position in society of the parties to the suit, whereas there was no evidence of their position in society. Gessley v. Railroad, 26 Mo. App. 161; Friedman v. Pub. Co., 102 Mo. App. 694; McKeon v. Railroad, 42 Mo. 79; Wasson v. McCook, 70 Mo. App. 397; Beauchamp v. Higgins, 20 Mo. App. 514.

*Theodore Bruere and Norton, Avery & Young for respondent.*

NORTONI, J.—This is a suit for damages accrued to plaintiff as a result of an alleged assault and battery made upon him by defendants. Plaintiff recovered and defendants appeal.

The evidence tended to prove that plaintiff was assaulted by defendant Henry Ostmann, Sr., and his son, William Ostmann, in a public road, without just provocation. As a result, plaintiff received a severe beating at the hands of both defendants. The elder Ostmann used his fists and the younger Ostmann a club in inflicting the punishment. It seems a controversy arose first between plaintiff and Henry Ostmann, whereupon Henry Ostmann felled plaintiff to the ground and got upon him. While plaintiff and Henry Ostmann were in this posture, William Ostmann hit plaintiff one or more blows with a club. The jury awarded plaintiff five hundred dollars actual damages and five hundred dollars punitive damages against both defendants.

It is not entirely clear, however, whether this verdict was given on the theory that defendants were joint tortfeasors or on the theory of an independent liability against each for his wrongful conduct in the premises. The instructions given by the court at the instance of plaintiff in no just sense required the jury to find that defendants acted in concert, but, on the contrary, confused the issue with respect to this matter. By instruction number 3 for plaintiff, the court permitted a re-

covery against defendant Henry Ostmann alone even though he acted independently and without concert with his co-defendant William Ostmann. The instruction referred to substantially directed the jury that if it found Henry Ostmann assaulted and beat plaintiff without cause therefor, "then the jury will find a verdict against the defendant, Henry, irrespective of whether he did or did not act in concert with defendant, William, and assess such damages," etc.

Instruction number 4 for plaintiff substantially directed the jury that a verdict might be returned for plaintiff against defendant, William Ostmann, if it appeared he assaulted and beat plaintiff without just cause, even though the jury believed he did or did not act in concert with defendant, Henry Ostmann. We believe those instructions were erroneous in the form given, for they omitted to inform the jury that in no sense could a joint verdict be given against both defendants unless there was concert of action between them. The theory of these instructions is that each defendant is liable to respond individually to plaintiff for his wrongful conduct in the premises notwithstanding there may have been no co-operation between the Ostmanns and no concert of action on their part. No doubt the doctrine is sound enough, if perchance the finding was against one only, but to authorize a joint recovery as was had here, the jury must find as a fact that there was concert of action between the defendants. For intentional torts committed independently by different tortfeasors impose no joint liability even though their combined influence may result in an injury to the plaintiff. [Barton v. Barton, 119 Mo. App. 507, 531, 94 S. W. 574; Kinkead on Torts, secs. 44, 45, 46.] The essential fact to joint liability in cases of willful tort is that there must be co-operation between the tortfeasors. In other words, unless there is concert of action between those who are charged jointly with an unlawful assault, there can be no joint liability to respond in damages for the tres-



pass. In this respect the theory of liability is to be distinguished from that which obtains with respect to joint tortfeasors in the law of negligence. [Kinkead on Torts, secs. 40 to 46, inclusive; *Barton v. Barton*, 119 Mo. App. 507, 531, 94 S. W. 574; 1 Cooley on Torts (3 Ed.), 223 to 232.]

For the reasons given, instructions permitting a joint recovery of damages against several defendants for a wrongful assault without requiring a finding to the effect that defendants acted in concert and co-operated with each other in inflicting the injuries upon plaintiff have heretofore been condemned by this court. See *Thomas v. Werremeyer*, 34 Mo. App. 665. But it is said by plaintiff that other instructions given by the court sufficiently apprised the jury that no joint recovery could be had unless it was found as a fact that defendants acted in concert. We are not so persuaded. Instead of elucidating the matter, plaintiff's instruction number 5 confused it highly. That instruction purports to enlighten the jury on the several elements of damages to be considered provided the issues were found for plaintiff. Among other things, it directed that the humiliation and disgrace caused plaintiff might be considered, etc. It said such humiliation and disgrace were competent matters to be considered by the jury if caused by the acts of defendants acting independently or in concert. Furthermore, the same instruction informed the jury that if it found the assault was made by the defendants in concert or by either of them maliciously, exemplary damages could be allowed, etc. Instead of alleviating the error of instructions 3 and 4, referred to in reference to concert of action, instruction number 5 seems to accentuate it, for by this the jury were given to understand that in computing the damages it was quite immaterial as to whether or not defendants acted in concert or independently. Another instruction for plaintiff, 10A, directs the form of the verdict to be returned if it be found the two defendants acted in con-

cert and maliciously made the assault, etc. There is certainly nothing in this instruction which may be regarded as sufficient to inform the jury that in no instance would it be competent for them to allow a joint recovery against defendants in the absence of it appearing that they acted in concert. The point against the instructions is that they authorized the jury to find a verdict against either of the defendants for his own wrong irrespective of the matter as to whether or not they acted in concert and omitted to enjoin in plain terms that a joint recovery could not be allowed unless there was concert and co-operation on the part of defendants. This error was fundamental, for concert of action is the essential fact to joint liability for intentional tort.

By the verdict, it appears the jury were of opinion plaintiff should be recompensed by the two defendants to the extent of five hundred dollars for actual and five hundred dollars for punitive damages. It may be they concluded to award the amount of two hundred and fifty dollars actual and two hundred and fifty dollars punitive damages against the separate defendants on account of the individual wrong of each, as indicated in the instructions commented on, and thus formulated their award of one thousand dollars, all in one verdict. This is not just, however, unless the defendants acted in concert, for under such circumstances one defendant ought not to be required to respond for the entire amount if the other is not able to pay. The rule that one person engaged in an assault is not liable for the acts of another engaged in the same assault unless there is concert of action obtains throughout both the civil and criminal law and is universally enforced. See *State v. Meyers*, 174 Mo. 352, 74 S. W. 862.

That exemplary or punitive damages are allowed in actions of tort accompanied with circumstances of malice, wantonness, etc., is beyond question, and in such cases it is competent to show the financial standing of

the defendant to the end of meting out a proper punishment. [Buckley v. Knapp, 48 Mo. 152; Hartpence v. Rogers, 143 Mo. 623, 45 S. W. 650.]

In support of his prayer for punitive damages, plaintiff introduced evidence, over the objection and exception of defendants, tending to prove that defendant, Henry Ostmann, was possessed of as much as forty thousand dollars worth of property in St. Charles county. If this suit were a proceeding against Henry Ostmann alone, the evidence referred to would be entirely competent; but it is not so in view of the fact that there are two defendants, for it is highly unjust that the recovery against both shall be expanded because of the wealth of one only. Punitive damages are such as are allowed beyond and above the amount of which a plaintiff has really suffered and they are awarded upon the theory that they are a punishment to the defendant and not a mere matter of compensation for injuries sustained by the plaintiff. While both of the defendants in this case are liable for compensatory damages, it is highly unjust to mulct William Ostmann by inflating the verdict against him because of the wealth of his co-defendant, Henry. On this question the Supreme Court of the United States has said:

"As the verdict must be for one sum against all defendants who are guilty, it seems to be plain that when the plaintiff voluntarily joins several parties as defendants, he must be held to thereby waive any right to recover punitive damages against all, founded upon evidence of the ability of one of the several defendants to pay them. This rule does not prevent the recovery of punitive damages in all cases where several defendants are joined. What the true rule is in such case is not perhaps certain. [7 Ill. App. 639; 99 Penn. St. 63.] But we have no doubt it prevents evidence regarding the wealth of one of the defendants as a foundation for computing or determining the amount of such damages

against all." See *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 553.

While it is entirely clear that the evidence tends to prove a case for punitive damages against both of the present defendants, it is equally clear that so much of such damages as are predicated on the wealth and financial standing of Henry Ostmann ought not to be allowed jointly against him and his co-defendant. See the following authorities in point: *Leavell v. Leavell*, 114 Mo. App. 24, 89 S. W. 55; *Smith v. Wunderlich*, 70 Ill. 426; *Toledo Wabash, etc., Ry. Co. v. Smith*, 57 Ill. 517; *McCarthy v. DeArmit*, 99 Penn. St. 63.

The judgment should be reversed and the cause remanded. It is so ordered. All concur.

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**EMILE W. BAUER, Respondent, v. WEBER IMPLEMENT COMPANY, Appellant.**

St. Louis Court of Appeals, May 31, 1910.

1. **STATUTE OF FRAUDS: Exchange of Real Estate: Complete Performance.** A contract for exchange of real estate is taken out of the Statute of Frauds by its complete execution or performance.
2. ———: **Stranger Cannot Set Up.** A stranger to a contract cannot set up the Statute of Frauds against it.
3. **FRAUD AND DECEIT: Contracts: Defense not Available to Stranger to Contract.** In an action of replevin, where plaintiff claims title through a contract made by him with a third person, a defense that the contract was procured through fraud practiced on said third person by plaintiff is not available to defendant, since said third person, and not defendant, was the proper party to assail the contract on that ground.
4. **TRIAL PRACTICE: Fraud and Deceit: Failure to Plead: Theory at Trial: Instructions.** In an action of replevin, where plaintiff claimed title through a contract made by him with a third person, defendant was not entitled to an instruction submitting the issue of the contract having been induced by fraud, not having pleaded fraud, and having tried the case, not on the theory that the contract was so induced, but that it was rescinded.

5. **CHATTEL MORTGAGES: Liability of Purchaser from Mortgagor: Agreement to Assume Mortgage.** A promise by one who purchased two chattels to pay notes secured by a mortgage on one of the chattels as part consideration for the sale would not charge the other chattel with the lien of the mortgage as against him, although it was covered by the mortgage, the copy filed with the Recorder not showing that fact and the buyer having no knowledge of it.
6. ———: ———: **Effect of Failure to Record.** Generally, a chattel mortgage is not good against anyone but the parties to it, if it is not recorded, and a buyer is protected from the effect of such an instrument, if by some mistake in recording it its true effect is not shown.
7. ———: ———: **Effect of Purchaser Acquiring Knowledge of Mortgage After Buying.** Where one acquires title to chattels without notice or knowledge of a mortgage thereon, the fact that he subsequently learned thereof would not make it enforceable against him.
8. **EVIDENCE: Admissions: Compromise.** Evidence relating to a compromise of a disputed claim is not competent as an admission by a party thereto against interest.

Appeal from St. Francois Circuit Court.—*Hon. Chas. A. Killian*, Judge.

**AFFIRMED.**

*B. H. Boyer* and *J. A. Boughty* for appellants.

(1) A contract must be stated with reasonable certainty or it will be void. . And if memorandum is incomplete as to any essential part, parol evidence cannot be received to supply such omission. *Ringer v. Holtzelaw*, 112 Mo. 523; *Dunham v. Hartman*, 153 Mo. 629; *Buckman v. Dry Goods Co.*, 91 Mo. App. 463, and cases cited. And when parol evidence is necessary to complete a written memorandum or contract it falls within the Statute of Frauds. *King v. Wood*, 7 Mo. 390; *Whaley v. Hinchman*, 22 Mo. App. l. c. 486; *Bolck & Snyder v. Crowther*, etc., 74 Mo. App. 483, and cases cited. (2) The Statute of Frauds is properly invoked as a defense under a plea of the general issue by timely objection

to the introduction of the contract and of the parol evidence offered to supply the same. *Hackett v. Watts*, 138 Mo. 511; *Dunn v. McClintock*, 64 Mo. App. 196; *Boyd v. Paul*, 125 Mo. 9; *Scharff v. Klein*, 29 Mo. App. 551, and cases cited. In the case at bar the objection made was timely and specific. See transcript, pp. 39 and 40. (3) The court erred in excluding testimony offered by defendant tending to show fraud in the procurement of the contract sued on in this case. It was competent for defendant to show fraud in procuring the contract even had it not been specifically pleaded. *Stone v. Barrett*, 34 Mo. App. 15; *Auction Co. v. Mason*, 16 Mo. App. 473; *Young v. Glasscock*, 79 Mo. 574; *Greenway v. Jones*, 34 Mo. 326. (4) The testimony offered by defendant and rejected by the court tending to show that long after the alleged acquisition of the personal property by plaintiff mentioned in the memorandum plaintiff worked for witness J. D. Counts in sawing lumber with that very machinery, and received from said Counts his wages and receipted therefor, was not only competent but very material as tending to show his recognition of title in said Counts, and was improperly excluded as embraced in a compromise arrangement. The statute relative to the inadmissibility to the matter made the subject of a compromise proposition has no application to the facts in hand. Sec. 751, R. S. 1899; *Emmons v. Gordon*, 125 Mo. 1. c. 646; *Burnham, Hanna, Munger & Co. v. Blank*, 49 Mo. App. 62; *Book v. Railroad*, 72 Mo. App. 78. (5) The proposition is too well settled to need citation that a contract to be valid must be mutual and binding on both parties thereto and must be based upon a valuable consideration. (6) The parol evidence rule does not apply in an action to cancel an instrument for fraud. And parol evidence is admissible to show that the signature of a party was procured to a written instrument by fraud. 7 Current Law, p. 1825, note 73; *Mining Co. v. Webster*, 193 Mo. 364. (7) The possession by defendant of the engine in dispute was

prima facie evidence of its ownership thereof, and before plaintiff can recover he must show some general or special property in the engine, and the right of immediate and exclusive possession. *Groves v. Parker*, 38 Mo. 160; *Garlside v. Nixon*, 43 Mo. 139; *Lisenby v. Phelps*, 71 Mo. 522; *Hardware Co. v. Hdw. Co.*, 75 Mo. App. 522; *Westby v. Milligan*, 89 Mo. App. 294; *Bank v. Snyder*, 85 Mo. App. 82. Instruction No. 5a, offered and asked by defendant was a proper declaration of the law and should have been given. (8) Instructions 8 and 9 given on behalf of plaintiff over the objections and exceptions of the defendant made and saved at the time were improper and highly prejudicial as constituting a virtual direction on the part of the court to the jury to find for the plaintiff. Neither of said instructions should have been given. (9) The court should have sustained defendant's application set up in its answer to require plaintiff to make J. D. Counts a party defendant to this suit. Sec. 544, R. S. 1899. The non-joinder of necessary parties defendant not appearing from the face of the petition, the objection was properly raised by answer. Sec. 598, R. S. 1899; *Turner v. Lords*, 92 Mo. 113; *Lencke v. Tredway*, 45 Mo. App. 507; *Dannaway v. O'Rielly*, 102 Mo. App. 718; *Mills v. Carthage*, 31 Mo. App. 143.

*B. H. Marbury* and *Edward A. Rozier* for respondent.

(1) The contract between Bauer and Counts was a valid contract and having been fully executed by both parties, cannot now be impeached. (a) Any appreciable consideration is sufficient to support a contract of this character. *Wallan v. Figone*, 107 Mo. App. 362; *Green v. Higham*, 161 Mo. 333; *Anderson v. Gaines*, 156 Mo. 664; *Forbes v. Railroad*, 107 Mo. App. 661; *Brown v. Cory*, 74 Mo. App. 466. (b) A party who contracts to deliver a certain thing will not be relieved of liability,

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even if at the time of the promise he did not have the thing promised; hence it must follow that although he does not at the time of the promise have the thing promised, yet he has fully performed his contract if he obtains it and delivers it according to the terms of his contract. 1 Story on Contracts (4 Ed.), par. 463. (c) While the title may not have been perfect when the suit was commenced, specific performance may be decreed if the title be perfected before judgment. Isaacs v. Skrainka, 95 Mo. 517; Luckett v. Williamson, 37 Mo. 338; Scannell v. Soda Fountain Co., 44 Mo. App. 78; Scannell v. Soda Fountain Co., 161 Mo. 603. (2) Appellant, Weber Implement Company, not having recorded its chattel mortgage covering the engine until April 26th, 1907, can make no claim to a title passing before that date. Sec. 3404, R. S. 1899; Rawlings v. Bean, 80 Mo. 614, and cases cited in Annotated Statutes, 1906. (a) The fact that the appellant did on July 9, 1906, file a chattel mortgage from Counts covering a separator only, and the later mortgage filed and recorded April 26, 1907, showed that the writing purporting to cover the engine was in a different ink, was sufficient ground for the jury to have found, as they probably did, that this insertion was made after the transfer to Bauer. (3) No substantial evidence was offered that Bauer ever had any knowledge of the mortgage on the engine, in fact the testimony of Judge Nations clearly indicates the contrary, as also does the representation made in the written agreement, and even if he had actual knowledge, sec. 3404 expressly provides that it cannot avail the appellant. Bryson v. Penix, 18 Mo. 14; Wilson v. Milligan, 75 Mo. 41; Sauer v. Behr, 49 Mo. App. 88; Harrison v. Carthage, 95 Mo. App. 80; Landis v. McDonald, 88 Mo. App. 335; Babitt v. Kelley, 96 Mo. App. 534; Bevans v. Bolton, 31 Mo. 437. (4) The written agreement was a valid contract supported by mutual consideration, and even if Bauer sold the Tetley-Klein lots to Counts at a higher price than he was to pay, it



was the agreement of the parties. *Green v. Higham*, 161 Mo. 333; *Marks v. Bank*, 8 Mo. 316; *Forbes v. Railroad*, 107 Mo. App. 661; *Strong v. Whybark*, 204 Mo. 341; *Wirt v. Schumann*, 67 Mo. App. 163; *Lamp Co. v. Mfg. Co.*, 64 Mo. App. 115; *Murdock v. Lewis*, 26 Mo. App. 234; *Fitzgerald v. Fleming*, 58 Mo. App. 188; *Mason v. Gass*, 62 Mo. App. 452. (5) The defense of fraud in the execution of this agreement was abandoned by the defendant, and the sole attack was that it had been abrogated by a later agreement, and this defense was submitted to the jury. (a) The matters stated by appellant under point 1 of its brief have no application, for the agreement was executed by both parties. See *v. Mallonee*, 107 Mo. App. 721; *Suggett's Admr. v. Cason's Admr.*, 26 Mo. 221; *Blees v. Jenkins*, 129 Mo. 647; *Taylor v. Penquite*, 35 Mo. App. 389; *Mitchell v. Branham*, 104 Mo. App. 480; *Smith v. Davis*, 90 Mo. App. 533. (6) The objections stated under point 2 have no merit as the property conveyed by the deed from Tetley-Klein Lumber Co. to Counts was shown to be the "Tim Glover" property by the testimony of the plaintiff and witness Tetley, and also witness Counts, and was directly connected with the agreement as having been made in pursuance thereof. *Lancaster v. Elliott*, 55 Mo. App. 249; *Belch v. Miller*, 32 Mo. App. 397. (7) No testimony was offered to show fraud in the procurement of the contract. (8) Proof of statement made by Bauer in conversation with Counts as to a settlement of the amount due from Kollmeyer was properly denied as the evidence of Counts showed that same was in effort to compromise. *Cullen v. Ins. Co.*, 126 Mo. App. 412; 1 *Greenleaf on Evidence*, sec. 192; *Railroad v. Farrell*, 76 Mo. 183; *Taussig v. Shields*, 26 Mo. App. 318; *Huetteman v. Viesselmann*, 48 App. 582; *Gorham v. Auserwald*, 59 Mo. App. 77; *Planing Mill v. Ins. Co.*, 59 Mo. App. 204; *Fink v. Ins. Co.*, 60 Mo. App. 673; *Herman v. Railroad*, 77 Mo. App. 377; *Hunter v.*

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Helsey, 98 Mo. App. 616; Smith v. Shell, 82 Mo. 215; Ferry v. Taylor, 33 Mo. 323. (9) In the contract Bauer agreed to trade certain houses and lots known as the "Tim Glover" property, this he did, hence it can make no difference whether he actually owned same or not. He did in fact cause to be conveyed to Counts the very property agreed upon, hence Counts has no cause of complaint for he received exactly what he had contracted for and the testimony of witness Tetley shows that it was conveyed at the request of Bauer.

GOODE, J.—Replevin for a steam engine which was sold by defendant to J. D. Counts, along with a separator and sawmill, in June, 1906. At that time defendant took from Counts, for part of the purchase price of said machinery, five notes amounting to \$525, falling due as follows: Two on October 15, 1906, two on October 15, 1907, and one October 15, 1908. These notes were secured by a chattel mortgage executed by J. D. Counts to defendant, June 16, 1906, but what the mortgage covered is in dispute. The copy of it filed with the recorder of deeds of St. Francois county, July 9, 1906, covered nothing but the separator; whereas defendant contends the original mortgage covered the steam engine in controversy in the present case. The original was not filed with the recorder until April 22, 1907, and when introduced in evidence appeared on its face to cover both the separator and the steam engine; but an issue was made at the trial as to whether it was executed by Counts to cover the engine described in it, or an interlineation was afterwards made without authority from Counts, to make it appear the engine was mortgaged. Besides the defense that the chattel mortgage covered the engine in controversy and plaintiff had actual knowledge of the fact when he acquired title to it, if he ever did, the further defense is made that in truth he never acquired the title. The facts touching the

issue are these: The Tetley-Klein Lumber Company, a corporation, owned two houses and three lots on which the houses stood, in Farmington, St. Francois county. The lots were Nos. 7, 8 and 18, block 17, J. L. Haw's Addition to Farmington, and were known as the Tim Glover property. A mortgage to a building and loan association was on the property for six hundred dollars or upwards. Prior to March 17, 1907, plaintiff Bauer had negotiated with the Tetley-Klein Lumber Company to purchase the property and the company had offered it to him for five hundred dollars, he to assume the incumbrance to the loan association. After Bauer had agreed to take the property, he entered upon a negotiation with Counts to purchase the engine in controversy, and the result of the negotiation, according to the testimony for plaintiff, was that Counts traded him the engine, sawmill and separator for the houses and lots aforesaid, and by plaintiff's direction the Lumber Company executed a deed for them to Counts. It is certain a deed was executed, and, the evidence strongly inclines to prove, under the arrangement stated; but Counts testified it was pursuant to a different arrangement and his version will be stated presently. Bauer and Counts executed the following memorandum of an agreement, prepared by Wm. Kennedy, Count's father-in-law, when both parties were present, and signed by them in Kennedy's office as soon as it was drawn:

"This contract, made this 17th day of March, 1907, by and between J. D. Counts of the 1st part and Emile Baur 2 part, witness J. D. Counts has this day traded Bauer his engine, sawmill and separator for two houses and lots situated in South Farmington, known as the Tim Glover property; J. D. Counts agrees to pay Emile Bauer Five Hundred and Fifty dollars (\$550) and assume the mortgage of the Building & Loan for Six hundred; Emile Bauer agrees to assume the payment of

a deed of trust now in the hands of Weber Implement Co. for Five Hundred and Twenty-five dollars on separator.

"J. D. COUNTS,  
"E. W. BAUER."

"Received \$8 as earnest money from J. D. Counts, March 17, 1907.

E. W. BAUER."

Without going into details, suffice to say the testimony of Samuel Tetley, president of the Tetley-Klein Lumber Company, as well as the testimony of other witnesses, was in corroboration of Bauer's version of the arrangement between him and Counts, and went to prove the memorandum supra expressed the agreement between those parties that was carried out. Bauer took possession of the steam engine the day the memorandum was signed and held possession until May 2, 1907, when it was taken from him by Marion Smith, acting as agent for defendant, and turned over to defendant. The engine was then standing in an alley by plaintiff's residence, from whence it was moved by Marion Smith for defendant, which claimed the right to possession on account of Counts' defaulting in the payment of some of the notes secured by the chattel mortgage; defendant insisting, as stated, said mortgage covered the engine. Shortly after it was taken by Smith, plaintiff instituted this action against him and defendant to recover possession, but as it appeared on the trial Smith had turned the engine over to defendant and the latter had sold it under the mortgage, the action was dismissed as to Smith. Defendant and Smith filed separate answers in the case and Smith alleged various facts going to show Counts was induced to execute the written memorandum whereby the engine was traded to plaintiff, by the fraudulent representation and promise of plaintiff. The alleged fraudulent representation by plaintiff was that he owned the houses and lots, whereas he did not own them, but

the Lumber Company did; the supposed false promise was to pay off the mortgage for six hundred dollars on them; or to give Counts six hundred dollars wherewith to pay the mortgage. No more will be said about the alleged fraudulent inducement of the contract for the trade, for two reasons: First, because that defense was not pleaded in the answer of the Weber Implement Company, against which the judgment was rendered; secondly, the defense of fraud in inducing the contract was abandoned at the trial in favor of the defense that Counts and plaintiff rescinded the contract shown by the memorandum immediately after executing the instrument. The defenses set up in the answer of the Weber Implement Company were a general denial; that the mortgage of Counts to defendant embraced the engine in controversy and said mortgage was recorded prior to the institution of this action, defendant took possession of the engine under the mortgage prior thereto, and afterwards sold it under the power of sale given in the mortgage; that plaintiff at the institution of this action was not, and never was, the owner of or entitled to possession of the engine, and never had any interest in it; that Counts was a necessary party defendant; that plaintiff had actual knowledge the mortgage from Counts to defendant covered the engine at the time this action was instituted and long prior thereto. Counts testified plaintiff agreed before the signing of the memorandum, to pay six hundred dollars of the amount of the incumbrance on the lots, and he called on plaintiff to do this as they went down stairs from Kennedy's office. Plaintiff said he would get the money from his brother and pay Counts, but did not have it then. Counts insisted on immediate payment and when plaintiff declined to pay at once, Counts said the contract would be canceled, to which plaintiff assented; that plaintiff then said he wanted to buy the engine and other machinery, would pay six hundred dollars for them and had a check for the

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price or some other mode of raising the six hundred dollars, that Counts agreed to sell the property to plaintiff for said price, provided plaintiff would pay him within two weeks or thereabouts; that he (Counts) then had a contract with a man named Kollmeyer to do sawing and an arrangement was made between Counts and plaintiff by which the latter would have an interest in the work. The upshot of the transaction between plaintiff and Counts, according to the latter's statement, was that as they descended the stairs from Kennedy's office, they agreed to rescind the contract expressed in the memorandum and Counts gave plaintiff an option to buy the machinery for six hundred dollars within two weeks, but plaintiff did not buy it. He testified further plaintiff moved the engine to his (plaintiff's) home without the knowledge or consent of Counts; at the time of the sale to plaintiff he (Counts) told plaintiff the separator and engine were mortgaged to the Weber Implement Company, but there was no mortgage on the sawmill, and plaintiff bought after being thus informed. Counts said the transaction by which he acquired title to the two houses and lots from the Lumber Company had no connection with the sale of the engine to plaintiff, but after the option to buy had been given to plaintiff, he purchased the houses and lots from the Lumber Company for \$1150, paying one hundred dollars cash, giving his notes for \$450, and assuming the incumbrance to the building and loan association. The deed was dated April 5, 1907, recorded April 8, 1907, and recited the consideration was sixteen hundred dollars. Counts was unable to explain why this consideration was inserted, but it accords with the testimony of plaintiff and of Samuel Tetley. According to plaintiff, the consideration agreed on between him and Counts was sixteen hundred dollars, and thereby he would make a profit of several hundred dollars on the houses and lots. Counts took possession of the property when he received the deed from the Lumber Company and was in posses-

sion when the trial occurred. Tetley testified the property had virtually been bought by plaintiff and was conveyed to Counts by plaintiff's order. Plaintiff denied having been told there was a mortgage on the engine and the testimony conclusively shows he had the mortgage record run down by his attorney prior to signing the memorandum. The attorney found no incumbrance on the engine, but did find on file a copy of the mortgage to the Weber Implement Company covering the separator. This fact agrees with the memorandum, which recited that Bauer agreed to assume the payment of the deed of trust held by the Weber Implement Company on the separator to secure \$550. Such, we believe, were the material facts, though, as related by the witnesses, they run into minuter details. A verdict for plaintiff was returned, assessing the value of the engine at five hundred dollars, and the damages for taking and detention thereof, at one hundred and fifty dollars. From a judgment on said verdict this appeal was prosecuted. The instructions for plaintiff are not complained of and will not be recited. For defendant the court gave this instruction:

"The court instructs the jury that if you shall find and believe from the evidence in this cause that after the signing of the written memorandum or contract offered in evidence in this cause by plaintiff, that the plaintiff and Jeff D. Counts did mutually agree to rescind and abrogate said written contract or memorandum by verbal agreement, and that plaintiff did then and there agree to pay Jeff D. Counts the sum of \$600 for his (Counts') equity in and to the machinery mentioned in said written memorandum, then and in that event you are instructed that said written contract or written memorandum, was rescinded and abrogated and that said verbal agreement supersedes and takes the place of said written contract or memorandum, and if you shall further find from the evidence that plaintiff, E. W. Bauer, did then

and there agree with said Counts to permit him, the said Counts, to retain possession of said machinery until he, the said plaintiff, should pay the said sum of \$600 to said Counts, and if you shall further find from the evidence that said plaintiff did not pay the said sum to said Counts and that said Counts did not deliver the engine in dispute to said Bauer prior to the time of the filing of the petition herein, then you are instructed that plaintiff cannot recover in this action. And in this connection the court further instructs the jury that the parties to a written contract or memorandum may rescind and abrogate the same by parol, and the court further instructs the jury that while the burden of proving the rescission or abrogation of the written contract rests upon the defendant in this cause, and that it must prove that there was a meeting of the minds of said plaintiff and said Counts to amount to a rescission and abrogation of said written contract or memorandum, yet the court instructs the jury that in order to prove such a verbal rescission or abrogation of said written contract or memorandum, it is not necessary to show an express agreement to that effect, but an agreement to rescind may be shown by or inferred from the acts and declarations of the parties, and the question as to whether or not there was such a rescission or abrogation of said written contract or memorandum, is a question for the determination of the jury under all the facts and circumstances in evidence in this cause."

Several instructions requested by defendant were refused. The first asked the court to advise the jury if they believed plaintiff was not the owner of or had no interest in the real estate mentioned in the written contract, but the Lumber Company owned said real estate at that time and plaintiff had not paid said company for the real estate and had no deed or written contract with the Lumber Company for the title to same, then there was no consideration for the contract between



plaintiff and Counts, and plaintiff cannot recover in this action. The second asked the court to instruct that if the jury believed there was no consideration for the contract between Bauer and Counts, said contract was void and the verdict must be for defendant. The third instruction was that if the jury believed plaintiff had actual knowledge at any time prior to the institution of this suit, the Weber Implement Company held a chattel mortgage against the engine and separator given by Counts to secure payment of certain promissory notes for \$525, and prior to the institution of this suit Counts made default in the payment of said notes, and thereupon the Implement Company took the engine into its possession and sold same under the mortgage, the verdict should be for defendant. The fourth instruction was that if the jury believed plaintiff promised Counts, at the time of signing the written memorandum, to pay Counts six hundred dollars as part consideration for the exchange of the property therein mentioned, and then and there represented to Counts he was willing and able to pay said sum, and Counts signed the contract in reliance on those statements and thereafter plaintiff refused to pay, the written contract was void. Omitting the fifth refused request, which is unimportant, we come to the sixth, which, if given, would have advised the jury the written contract between plaintiff and Counts was without consideration and void if Bauer, at the time it was executed, had no interest in or title to the houses and lots mentioned in it. The seventh request declared if the jury believed the written contract between plaintiff and Counts was procured by false and fraudulent representations made to Counts respecting plaintiff's ownership of the houses and lots mentioned in the contract, and plaintiff represented himself as the owner of said property, when he was not the owner and had no title to it, and Counts relied on such statements, the contract was void.

I. Some of the points made by defendant on the appeal relate to the refused instructions, while others take a wider range. It is insisted the written contract between plaintiff and Counts was void because it provided for an exchange of real estate, and all the terms of the contract were not expressed in the memorandum; to-wit, the property was not sufficiently described and oral evidence had to be resorted to to identify the lots intended to be exchanged. This was an attempt by defendant to set up the Statute of Frauds and must fail for two reasons: First, because if the contract expressed in the memorandum was not rescinded, as Counts testified, but was carried into execution as plaintiff testified, then it was taken out of the Statute of Frauds by the delivery of the machinery to the plaintiff and putting Counts in possession of the real property; that is to say, by the complete execution or performance of the contract. [Winter v. Cherry, 78 Mo. 344; Hoyle v. Bush, 14 Mo. App. 408.] Second, defendant, who was a stranger to the contract, cannot set up the Statute of Frauds against it. [St. Louis, etc., R. R. v. Clark, 121 Mo. 169, 25 S. W. 192, 906.]

II. It is further insisted the arrangement between plaintiff and Counts shown in the memorandum was void because plaintiff, at most, had only an oral agreement with the Lumber Company about the real estate, and, this being invalid under the Statute of Frauds, plaintiff exchanged nothing of value with Counts for the machinery; that is to say, no consideration passed to Counts from plaintiff for the engine. What is said above is applicable to this proposition; defendant certainly cannot have an executed agreement between two other parties, with which agreement it had nothing to do, treated as a nullity, because not in conformity to the Statute of Frauds.

III. As regards the refusal of the instructions based on the alleged procurement by plaintiff of the

written contract from Counts by a fraudulent representation and promise, we might say Counts was the party to assail the contract for that reason; not the defendant. But suffice to say defendant pleaded no defense based on fraud; and, moreover, tried the case on the theory, not that the contract was induced by fraud, but that it was rescinded by plaintiff and Counts, and hence the title to the engine did not pass to plaintiff by virtue of said agreement, but was left in Counts.

IV. Another contention, although apparently not made in the court below, is that if plaintiff acquired the engine from Counts, he took it subject to defendant's mortgage, even though the copy of the mortgage then of record purported to cover only the separator and not the engine. To make this contention clear, it must be remembered that if the mortgage executed by Counts to defendant actually covered the engine, no instrument was on file in the office of the recorder of deeds of St. Francois county, which showed the fact, until April 22, 1907, or subsequent both to the signing of the contract between plaintiff and Counts and the execution of the deed from the Lumber Company to Counts. Defendant's argument is that in the memorandum contract between plaintiff and Counts, whereunder plaintiff claims title to the engine, he bound himself to pay off the notes secured by the chattel mortgage Counts had given to defendant; bound himself for \$525, reciting however, it was secured on the separator. Counsel say inasmuch as plaintiff bound himself to pay the whole amount secured by the mortgage, he recognized the mortgage as in force, and if it actually covered the engine, even though the copy of it on file in the recorder's office did not so show, plaintiff acquired the engine subject to the mortgage. We do not appreciate the force of this argument. Plaintiff agreed to pay the notes, it is true; but this agreement could not charge

the engine with the lien of the mortgage against plaintiff, if otherwise he would have acquired title free from the lien; at least we know of no authority or principle for such a proposition and have been cited to none. Whether or not the mortgage could be enforced against property covered by it after plaintiff bought the property, did not depend on his agreement to pay the notes, but on notice to him of the contents of the mortgage; and likely effective notice could only be given by the record; for generally a chattel mortgage is not good against any one but the parties to it if it is not recorded; for it is the duty of the mortgagee to have it recorded, if he would have it good against third parties. [Bevans v. Bolton, 31 Mo. 437; State to use Meyer v. O'Neill, 151 Mo. 67, 52 S. W. 240.] Defendant might say it filed a copy of the mortgage in question for record, but by mistake the copy failed to show it covered the engine. The rule is that a buyer is protected from the effect of an instrument if by some mistake in recording the instrument, its true effect is not shown. [Terrell v. Andrew Co., 44 Mo. 204.] Whether this rule would protect a buyer where a chattel mortgage on the property bought had been erroneously recorded, or an erroneous copy filed in the recorder's office, if the buyer knew of the mistake and that thereby the copy failed to embrace the property he was purchasing, though the original embraced it, is a nice point, but need not be determined on this appeal; for it was not presented below and is not presented here. What defendant insists on now and insisted on in requests for instructions, was that if plaintiff learned, *at any time prior to the institution of this action*, defendant's mortgage included the engine, he was not entitled to recover; and beyond doubt if plaintiff had no knowledge of the fact when he bought, but acquired knowledge before he filed his petition in replevin, his title was not affected so as to preclude recovery. Instead he bought as an innocent purchaser for value and without notice of any lien, and con-

tinued thereafter to hold as such, having parted with the property he exchanged for the engine, believing the title to the latter was unincumbered.

V. Much is said in the brief for defendant about some evidence it offered and the court excluded; but the evidence related to a compromise of a disputed claim and was incompetent as an admission by plaintiff against interest.

The points raised on the appeal are not well taken; the case was fairly tried and instructed, and the verdict of the jury on the issues of fact was well supported by the evidence. Far from thinking it is contrary to the weight of the evidence, our opinion is that it was right.

The judgment will be affirmed. All concur.

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**JOHN O. MARSHALL, Admr. of Estate of EDWIN  
R. STEADMAN, Deceased, Appellant, v. MIS-  
SOURI STATE LIFE INSURANCE COMPANY,  
Respondent.**

St. Louis Court of Appeals, May 31, 1910.

1. **LIFE INSURANCE: Policy and Premium Notes Constitute One Transaction.** Where a policy of life insurance and notes given for the premium are executed simultaneously and the latter refer to the former, they constitute one transaction.
2. ———: ———: **Stipulations in Premium Notes.** It is competent for insurer and insured to enter into an arrangement for settlement of the first year's premium on a life insurance policy partly in cash and partly in notes containing certain terms and provisions, and in that event, as between the company and insured, there is no law preventing stipulations in such premium notes from being as much a part of the contract as those in the policy.
3. ———: ———: ———: **Forfeiture for Non-Payment: Construction of Notes and Policy.** Notes in part payment of a first premium which stipulated that the policy should become void on failure to pay the same at maturity, and which were contemporaneous with the policy and were taken by the

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Marshall v. Life Insurance Co.

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vice-president before it was issued, and were accepted by the company, became binding on both it and insured, notwithstanding a clause in the policy declaring it and the application should constitute the entire contract, the meaning to be attributed to that clause, in order to harmonize it with the other stipulations, and especially those in the notes, being that future alterations of the contract were prohibited, save in the mode prescribed.

4. ———: ———: ———: ———: **Repugnancy.** There is no essential repugnancy between a note given for part of the first premium of a life insurance policy, which provided that failure to pay it at maturity would render the policy void, and the provisions of the policy itself, which recited it was granted in payment of a certain amount, being the premium for the first year, and the annual payment of the same sum each year thereafter for a certain period; that it should be incontestable after one year from its date, provided premiums were duly paid; that, after it had been in force for one year, a grace of one month would be allowed in the payment of premiums; that after three annual premiums were paid if the policy remained in force the company would make a certain loan thereon, and that it would give insured an option in a table of loan values; nothing, however, being said about notes being given for premiums. And where an insured failed to pay such a note, and the amount paid by him in cash was not sufficient to keep the policy in force to the date of his death, the beneficiary was not entitled to recover.
5. ———: ———: ———: ———: **Effect of Insurer's Attempt to Collect Notes.** Forfeiture of life insurance for non-payment of premium notes given in part payment of the first year's premium was not waived because the company tried to collect them when due, as the notes stipulated the contract should stand annulled if they were not paid and the full amount of the premiums should be considered as having been earned by the policy remaining in force during the period previous to the default.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin, Judge.*

**AFFIRMED.**

*A. A. Hunt and John O. Marshall* for appellant.

(1) It was the duty of the court to point out the competent and incompetent parts of the deposition, and

to exclude the incompetent parts. *Hamilton v. Scull*, 25 Mo. 165. The objection to the introduction of the deposition was timely, under section 2906, R. S. 1899, objections to incompetency and immateriality can be urged at any time. Rule 19, rules St. Louis Circuit Court, p. 14. The deposition was incompetent, one party to giving of notes being dead. R. S. 1899, sec. 4652; *Banking House v. Rood*, 132 Mo. 256; *Chapman v. Dougherty*, 87 Mo. 617; *Kaho v. King*, 19 Mo. App. 44; *Weiland v. Weiland*, 64 Mo. 168; *Sitton v. Shipp*, 65 Mo. 297. Van Fleet not a competent witness. *Banking House v. Rood*, 132 Mo. 256; *Chapman v. Dougherty*, 87 Mo. 617; *Kaho v. King*, 19 Mo. App. 44. Notes were immaterial and irrelevant, and improperly admitted in evidence. They were contradictory of the policy and of each other. Contrary to Act of 1907, p. 316. (2) It was error to permit the witness Stearnes to testify from a memorandum not made by himself, and error to admit the memorandum in evidence. *Fraber v. Hicks*, 131 Mo. 180. The introduction of the sixty-day note (exhibit B to the deposition) was improper. The notes were not a "charge" against the policy. A charge is "any lien on property of any description." 6 Cyc. 893; *Mack v. Prince*, 40 W. Va. 324; *Bank v. Elliott*, 125 Ala. 646. The conditions of policy could not be defeated by inconsistent expressions in collateral instruments. 25 Cyc., p. 743, note 75; 25 Cyc., p. 740, note 52; *May on Ins.* (4 Ed.), sec. 345F; *Ins. Co. v. Hardie*, 37 Kan. 673; *Union Central v. Buxer* (Ohio), 57 N. E. 66; *Elliott on Ins.*, 130, note 47 and 48; *Fithian v. North Western*, 4 Mo. App. 386; *Bacon on Insurance*, sec. 130, note 48; *Mut. Life v. French*, 30 Ohio St. 240. The company was estopped from denying that premium was not paid. *Mooney v. Home Ins. Co.*, 80 Mo. App. 192; *Jacobs v. Omaha Life*, 146 Mo. 523; *Dobyn v. Bay State*, 144 Mo. 95. (3) The court should have submitted the case to the jury, under proper instructions; the court should have advised the jury of the legal effect

of the language of the policy, leaving questions of fact to be determined by the jury. *Primm v. Haren*, 27 Mo. 205; *Gannon v. Gas Co.*, 145 Mo. 503; *McAfee v. Ryan*, 11 Mo. 364; *Turner v. Loler*, 34 Mo. 461. Forfeiture was waived by the company. *Rowe v. Brooklyn*, 38 N. Y. Sup. 621; *LaForce v. Williams*, 43 Mo. App. 518; *James v. M. R. F.*, 148 Mo. 1; *Knarston v. Thaub*, 124 Cal. 74; *Moreland v. Union Central*, 46 S. W. 516.

*Jones, Jones, Hocker & Davis* for respondent.

(1) The policy was null and void and not in force when the insured died. *Duncan v. Life Ins. Co.*, 160 Fed. 646. (2) The policy provided for the payment of the amount thereof only in the event that it was in force when the insured died. (3) The policy was issued in consideration of the payment of \$145.80, which amount was never paid. (4) The policy provides that non-payment of notes given as a charge against the contract will render policy null and void. The notes given for part of the first premium were not paid and the policy became null and void. (5) The notes given in part payment of the first premium provided for forfeiture of policy if they were not paid and the policy, therefore, became null and void when notes were not paid. (6) There was no waiver of forfeiture, for the notes provided that the notes were payable after forfeiture without reviving the policy. *Duncan v. Life Ins. Co.*, 160 Fed. 646; *Life Ins. Co. v. Murray*, 86 S. W. 813; *Life Ins. Co. v. Chowning*, 28 S. W. 119; *Laughlin v. Life Ins. Co.*, 28 S. W. 413; *Insurance Co. v. K. T. Lodge*, 32 Tex. Civ. App. 328; *Schultz v. Ins. Co.*, 42 Iowa 239; *Shakey v. Ins. Co.*, 44 Iowa 540; *Blackberry v. Ins. Co.*, 83 Ky. 574; *Smith v. Ins. Co.*, 6 Dak. 433; *Williams v. Ins. Co.*, 19 Mich. 451.

GOODE, J.—Action on a policy of life insurance issued by defendant company on the life of Edwin R. Steadman, dated October 12, 1905, whereby defendant



promised to pay the executors, administrators or assigns of the assured, or such other beneficiary as he might designate in accordance with the terms of the policy, the sum of three thousand dollars on receipt of satisfactory proof of the death of the insured, or, if he was living and the policy in force October 12, 1925, to pay him said sum. The policy recited it was granted in consideration of the application for it, which was part of the contract, the payment of \$145.80 premium for one year's insurance, and the annual payment of said sum October 12th every year thereafter for twenty years or until the death of the insured. When he applied for the policy, the insured paid \$95.80 on the first year's premium and executed two notes for twenty-five dollars each, one to fall due in thirty days after its date, and the other in sixty days after, which money and notes were accepted by the company. The two notes were identical except as to dates of maturity, the first one reading as follows:

"\$25.00

Company Form Note.

"East St. Louis, 10-11-1905.

"Interest. . . .

"Thirty days, without grace, after date, for value received, I promise to pay to the order of the Missouri State Life Insurance Company, Twenty-five Dollars, at . . . being in payment of part of the first annual premium on Policy Number 20,992, in said company. Said policy including all conditions therein for surrender or continuance as a paid-up term policy, shall without notice to any party or parties interested therein, be null and void on the failure to pay this note at maturity, with interest at six per cent per annum, payable annually.

"In case this note is not paid at maturity, the full amount of premium shall be considered earned as a pre-

mium during its currency and the note payable without reviving the policy or any of its provisions.

"Postoffice address, East St. Louis, Ill.

"EDWIN R. STEADMAN."

The policy declared it and the application together should constitute the entire contract which could "only be varied in writing at its home office in St. Louis by the president, vice-president or secretary of the company." The policy further declared as follows: It should be incontestable after one year from the date of its issue, provided premiums were duly paid; after it had been in force a year, a grace of one month would be allowed in the payment of subsequent premiums; after three annual premiums had been paid with the policy in force, the company would loan on the security of it, at six per cent interest, its full loan value as shown in the table it contained, setting forth its value in different years; after three annual premiums had been paid, the company would give the insured the choice of three different options shown in the table, which we need not recite as they are not pertinent to the appeal. The application for the insurance was taken by the vice-president of the company October 11, 1905, and it was to the vice-president the insured executed the two notes for the part of the first premium. At maturity the notes were sent to a bank for collection; but the bank returned them unpaid. Steadman died July 24, 1906, and plaintiff was appointed administrator of his estate, in which capacity he instituted the present action. The defense set up in the answer is that the insured, at the time the policy was issued, executed to defendant the two notes which declared they were in part payment of the first annual premium and that the policy should, without notice to any one, become null and void on failure to pay either of the notes at maturity; that a fruitless demand was made for the payment of them when they matured,

and thereby the policy became void and was not in force when Steadman died. After denying in the reply the averments of the answer, plaintiff alleged that if defendant was entitled to have the policy forfeited for failure of the insured to pay either of the notes at maturity, it waived the right of forfeiture by its course of dealing with Steadman and by attempting to collect the notes. When the evidence was in, the court directed a verdict for defendant, which having been returned and judgment entered accordingly, this appeal was taken.

Plaintiff insists the stipulation in the premium notes that the policy should become null and void on failure to pay a note, and that, too, without notice to anybody interested, was no part of the contract between the insurance company and Steadman, for two reasons: First, because said stipulation was inconsistent with the terms of the policy itself, and second, because the policy provided it and the application should constitute the entire contract. It is conceded the notes were executed simultaneously with the policy, and as the notes refer to the policy, the several instruments constitute one transaction. Nothing is said in the policy about the notes being given for premiums, and likely, the form was prepared with no thought of this being done, but in contemplation of the premium being paid in cash. Yet if these parties chose to enter into an arrangement for settlement of the first year's premium partly in cash and partly in notes containing certain terms and provisos, it was competent for them to do so. And, in any event, we know of no rule of law which would prevent the stipulation in the notes from being as much a part of the contract between the parties as the stipulations in the policy. That is to say, as between the company and the insured; for it must be borne in mind no third party was designated as beneficiary, but the policy was made payable to the executor or administrator of the insured, and his administrator can have no enlarged right in the

contract beyond what he himself took. Beyond question, the terms in the note became part of the terms of the contract between the parties, unless the stipulation in the policy, that the policy itself and the application should constitute the entire contract, compels another conclusion. This term of the policy was intended to prevent an alteration of its tenor and effect by any agreement made subsequent to the date of its issue, unless the agreement was assented to in writing at its home office by the president, vice-president or secretary of the company. The notes were contemporaneous with the instrument, and, moreover, were taken by the vice-president before the policy was issued, and were accepted by the company, became binding on it, and we hold were binding also on the insured, notwithstanding the clause of the policy which said it and the application should constitute the entire contract. Keeping in mind the fact that the notes were presented and accepted as part of the contract, the meaning to be attributed to said clause of the policy, in order to bring it into harmony with the other stipulations, and especially those in the notes, is that it prohibited future alterations of the contract save in the mode prescribed. [Duncan v. Life Ins Co., 160 Fed. 646.]

It is further contended the stipulation in the notes, that the policy should become null and void if the notes were not paid at maturity, was not binding because it was repugnant to the policy itself, the terms of which must control. We find no essential repugnancy between the instruments, which must be so construed, if possible, as to give force to every term of each. Authorities are cited wherein it was declared a proviso in a premium note for a forfeiture of a policy if the note was not paid at maturity, the policy containing no such term, was ineffective, and would be disregarded in an action for the insurance money. [Union Central Life Ins. Co. v. Buxer, 62 Oh. St. 385; Dwelling House Ins. Co. v. Hardy, 37 Kas. 674; Fithian v. Ins. Co., 4 Mo. App.

386; Mutual Life Ins. Co. v. French, 30 Oh. St. 240.] In the first of those cases the provision for forfeiture in the note was held invalid as against the beneficiary named in the policy, who was the wife of the insured; but it was said the insured would be bound by the stipulation in the note as far as his rights were concerned. In the Kansas case the court held the note provided for a forfeiture "as provided in the policy," and as the policy made no provision for a forfeiture for non-payment of the premium note, it should be held, construing the two instruments together, there was no stipulation for a forfeiture. In Mutual Life Ins. Co. v. French, the note said if it was not paid at maturity, the policy should be null and void, and the court held this proviso in the note gave the insurance company an option to declare a forfeiture or not, at its pleasure. In Fithian v. Ins. Co., the note said a failure to pay interest should forfeit the policy, whereas the policy itself provided that after a complete annual premium had been paid, there could be no forfeiture. This court held the manifest intention of the parties to make the policy non-forfeitable after payment of the premium, would not be defeated by an inconsistent expression in a collateral instrument. The opinion said the whole theory and plan of insurance as developed in the policy, negatived the possibility of total release of the company's liability by failure of the insured to make remittances after he had paid one or more premiums. The contract at bar, of which the notes are an integral part, is quite different from the contracts dealt with in those cases. The deceased had no right to expect the insurance would continue on his life after he had defaulted in his obligation; that is to say, had no reason to think the company had agreed to continue the risk if he did not comply with the promises that he had given about paying premiums. It is to be observed that not only did the deceased fail to pay his premium notes, but the part of the

first premium he paid in cash would not have sufficed to keep the policy in force to the date of his death. However, that is not a decisive fact. The policy suggests that payment of the first premium in advance and in cash and payment of all other premiums in advance was the usual course of business followed by defendant. An indulgence was granted Steadman for part of the first premium on the express condition that if he did not pay the deferred part, the policy should *ipso facto* become a nullity, as it would have been a nullity if issued without the indulgence and he had failed to pay in full the first premium.

Finally it is contended forfeiture for non-payment of the notes was waived because the company tried to collect them. But the notes stipulated the contract should stand annulled if they were not paid; further, that the full amount of the premium should be considered as having been earned by the policy remaining in force during the period previous to the default. Such being the contract, no waiver of forfeiture resulted from merely demanding payment of the notes when they fell due. [Duncan v. Ins. Co., *supra*; Union Cent. Ins. Co. v. Chowning, 86 Tex. 654, 28 S. W. 117; Jefferson Mut. Ins. Co. v. Murray, 86 S. W. 803; Laughlin v. Ins. Co., 28 S. W. (Tex.) 411; Blackerby v. Ins. Co., 83 Ky. 574; Shults v. Ins. Co., 42 Ia. 239; Shakey v. Ins. Co., 44 Ia. 540; Williams v. Ins. Co., 19 Mich. 451.] Those cases are not exactly like this one in their facts, but are enough like it for their principle to be applicable.

Judgment affirmed. All concur.

**MARGARET R. SHERMAN, Assignee of SIMPSON  
CATERING COMPANY, Appellant, v. MARTIN  
SHAUGHNESSY, Respondent.**

**St. Louis Court of Appeals, May 31, 1910.**

1. **CORPORATIONS: Subscription to Capital Stock: Evidence Held Insufficient to Establish.** In an action by the assignee of a corporation on an alleged subscription for stock, where, though defendant signed the subscription, it was upon an understanding with the president of the corporation that the corporation would purchase liquor from him and that the corporate officers would be paid only a nominal salary, and the president subsequently refused to comply with these conditions and stated the transaction was cancelled, and no certificate was issued to defendant, he was not named as a stockholder along with the others on the books of the company, and no call was made on him for payment until he was sued years after the date of his alleged subscription, the trier was warranted in finding, if he was not bound to find, that neither the president of the corporation, the corporation itself, nor defendant ever regarded defendant as a shareholder, and there was no contract of subscription that would render him liable.
2. **ASSIGNMENTS FOR CREDITORS: Powers of Assignee: Corporations.** Under section 365, Revised Statutes 1899 the assignee of a corporation for the benefit of its creditors has full power to represent the creditors in actions on obligations for stock subscriptions to the corporation
3. **CORPORATIONS: Purchase of Treasury Stock: Governed by Law of Sales.** A contract for the sale of stock of a corporation, which, after being issued, was turned into the treasury by its owner and was set aside as treasury stock to be sold for the purpose of raising funds, is a contract of sale and not one of subscription, in the sense subscriptions were taken for the original capital stock; and such a contract is governed by the law of sales of personal property generally.
4. **SALES: Terms.** The buyer may purchase upon any terms he proposes if the seller assents thereto.
5. **CORPORATIONS: Sales of Capital Stock: Incomplete Contract.** Where defendant agreed to purchase from the president of a corporation ten shares of its treasury stock upon condition that the corporation agree in writing to purchase all of its liquor from defendant and pay its officers only nominal

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Sherman v. Shaughnessy.

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salaries, the refusal of its president to sign such agreement released defendant from his liability to purchase, the contract not being fully executed.

6. ———: **Sale of Treasury Stock.** Corporate stock may be conveyed to the company by the original subscribers to be sold by it as treasury stock.
7. ———: ———: **Conditions of Sale Concurrent and Dependent.** The conditions and promises assented to by a corporation in the sale of treasury stock are concurrent and dependent, so that neither party can require the other to perform, without first offering to perform himself.
8. ———: **Purchase of Stock: Action for Price: Fraud Good Defense.** Fraudulent representations, inducing the purchase of corporate stock, are a good defense to an action against a purchaser for the price.
9. ———: ———: ———: **Tender of Stock Necessary.** Where a contract for the acquisition of corporate stock is essentially one of purchase, it is essential to a recovery of the purchase price that the stock be tendered, even though the contract is a completed one.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm, Judge.*

**AFFIRMED.**

*Roland M. Homer* for appellant.

(1) The subscription contract entered into between the various subscribers was a valid contract. It was not unilateral. The promises of each subscriber to the other were sufficient consideration. These promises were made to each other for the benefit of the corporation. *Railroad v. Crow*, 137 Mo. App. 461; *Business Men's Association v. Williams*, 137 Mo. App. 575; *Hill v. Mining Co.*, 124 Mo. 166; *Glover v. Henderson*, 120 Mo. 367; *Lewis v. Ins. Company*, 61 Mo. 538; *Hotel Co. v. Smith*, 13 Mo. App. 7; *Haskell v. Sells*, 14 Mo. App. 91; *Haskell v. Worthington*, 94 Mo. 560; *Hotel Co. v. Wright*, 73 Mo. App. 240. (2) It was not necessary to allege or prove a tender of the stock or demand for



the money. *Champion v. Rischert*, 74 Mo. App. 542; *Haskell v. Sells*, 14 Mo. App. 91; *Williams v. Taylor*, 120 N. Y. 244; *Harwood v. Diener*, 41 Mo. App. 51; *McManus v. Gregory*, 16 Mo. App. 375; *Soap Wks. v. Sayers*, 55 Mo. App. 15; *Railroad v. Crow*, 137 Mo. App. 461; *Business Men's Association v. Williams*, 137 Mo. App. 575; *Coppage v. Gregg*, 127 Ind. 363; *Bank v. Benoist*, 10 Mo. 525. (3) The trial court erred in permitting the introduction of the conversation between the defendant and the president of the catering company for the purpose of varying the terms of the contract sued upon, and further erred in holding that the result of such conversation was a release of defendant's liability. *Ins. Company v. Wolfson*, 124 Mo. App. 291; *Koons v. Car Co.*, 203 Mo. 255; *Ollesheiner v. Mfg. Co.*, 44 Mo. App. 172; *Haskell v. Sells*, 14 Mo. App. 101; *Schaeffer v. Insurance Co.*, 46 Mo. 248; *Hotel Co. v. Wright*, 73 Mo. App. 240; *Haskell v. Worthington*, 94 Mo. 560; *La Grange v. Mays*, 29 Mo. 64; *Pickering v. Templeton*, 2 Mo. App. 424; *Railroad v. Crow*, 137 Mo. App. 468.

*R. M. Nichols* for respondent.

(1) This is an action at law, tried before the court, without instructions, and without raising any question of law during the progress of the trial, and is not reviewable by this court. *Altum v. Arnold*, 27 Mo. 264; *Easley v. Elliott*, 43 Mo. 289; *Wilson v. Railroad*, 46 Mo. 36; *Weilandy v. Lemuel*, 47 Mo. 322; *Jordan v. Davis*, 172 Mo. 608; *Bozarth v. Legion of Honor*, 93 Mo. App. 564. (2) Under the allegations of the petition and the proof the suit is on a contract of sale of stock of a corporation already organized, as distinguished from a contract of formative subscription to the capital stock of the corporation to be organized. *Morawetz on Corps.* (2 Ed.), secs. 46, 61; *Clark v. Imp. Co.*, 57 Ind. 138; *Weiss v. Iron Co.*, 58 Pa. St. 295;

Thrasher v. Railroad, 25 Ill. 393; St. Paul, etc., v. Robins, 23 Minn. 44; Railroad v. Curtis, 80 N. Y. 219; Railroad v. Little, 14 Bush. 429; Railroad v. Hambleton, 77 Md. 341; Wood v. Jefferson, 57 Minn. 458. (3) Being a contract of sale no title passed to Mr. Shaughnessy and he did not become a stockholder until the stock was actually issued and transferred, or delivered or tendered to him. Delivery of the certificates and payment of the amount were intended to be concurrent acts, and upon failure to carry out the contract by delivery by plaintiff's assignor, plaintiff cannot recover the purchase price. The petition in this view of the case does not state a cause of action, because it does not aver a transfer of the stock, nor a delivery or attempt to deliver the stock to the defendant. The testimony conclusively shows that no issue of stock, delivery or attempt to deliver or tender of the same to the defendant was ever made. See authorities under point 2, and in addition. White v. Salisbury, 33 Mo. 150; Fine v. Hornsby, 2 Mo. App. 61; Stockwell v. Merc. Co., 9 Mo. App. 133; Boatmen's Inst. & T. Co. v. Abel, 48 Mo. 136; Greene v. Iron Co., 88 Fed. Rep. 203. (4) The contract, not being a subscription to capital stock of a corporation to be organized, but being a contract for the purchase of capital stock in a corporation already organized, the defense of fraud or rescission is as applicable as in any other ordinary contract. Wells v. Jones, 41 Mo. App. 1; Haskell v. Worthington, 94 Mo. 560; Ramsey v. Mfg. Co., 116 Mo. 313; Hess v. Draffen, 90 Mo. App. 580; Tinker v. Kier, 195 Mo. 183. (5) It was a fraud upon Mr. Shaughnessy for the president of the corporation to lead him into the belief that the corporation would do the thing specified in the proposed contract in order to get his signature to the contract for the sale of the stock, and after she had got the same, refuse to enter into the written contract. The evidence of fraud was admissible and did not contra-

dict or vary the written contract. *Wells v. Jones*, 41 Mo. App. 1; *Haskell v. Worthington*, 49 Mo. 560.

GOODE, J.—The Simpson Catering Company was a Missouri corporation, incorporated February 19, 1904. The original subscribers for the capital stock of \$50,000 were Corinne Simpson, William C. Morgan and S. J. Hoge, the first of whom subscribed for 498 shares and the other two for one share each. Mrs. Simpson had obtained a concession from the Louisiana Purchase Exposition Company and this concession was transferred by her to the incorporated company as full payment of its capital stock. She was named as president of the company, William C. Morgan as vice-president and S. J. Hoge, secretary, and those three persons were named as the first board of directors. At a meeting of the company held February 20, 1904, the stockholders voted to increase the board of directors to five, and Jean P. Baerveldt was elected director, but who the fifth was is not shown. After the election of Baerveldt, Morgan resigned as vice-president and Baerveldt was chosen to fill that office. March 24th a motion was adopted, reciting the previous resolution by which the directors were increased from three to five, and at the same time Hoge resigned as director. This left as officers Corinne Simpson, president, Jean T. Baerveldt, vice-president, Wm. C. Morgan as secretary, and S. J. Hoge as treasurer, with Mrs. Simpson, Baerveldt and Morgan as directors. At the meeting February 20th, when the stockholders were the persons stated, it was voted the capital stock of the company should be paid in full by the transfer of all rights of Mrs. Simpson, and that she should transfer \$25,000 of the stock subscribed by her to the treasury of the company, to *"be set aside as treasury stock to be sold for the purpose of raising funds to build a restaurant and equipping the same, said stock to be sold at par."* Later Mrs. Simpson solicited persons to subscribe for or pur-

chase shares of the treasury stock and among others, solicited defendant. The persons solicited were asked to sign the following paper, and the names of those who signed were shown at the foot of it.

"St. Louis, Mo., Feb. 18, 1904.

"We the undersigned, subscribe and agree to pay for in cash, for the number of shares of the capital stock of the Simpson Catering Company, of St. Louis, Missouri, set opposite our names. Money to be deposited with the Commonwealth Trust Company, of St. Louis, Missouri, as bankers to the credit of the Simpson Catering Company, upon the condition that all the received money is to be used for the general running expenses and the building of buildings, improvements and equipment, according to the plans and specifications and drawings made by the architect, and that upon delivery of the check or cash to the company or the trust company, a certificate of stock to the amount is to be delivered to the purchaser of the stock, of the par value \$100 each, paid for at par.

"The concession is granted and is assigned to the Catering Company by Mrs. Corinne Simpson, and the bond and all stipulations have been complied with to the Fair Company.

"The building shall have a seating capacity of 1,000 persons, and shall be conducted as an eating house, restaurant, buffet and general refreshment place, during the term of the St. Louis World's Fair Exposition is in progress.

"The capital stock of the company is fifty thousand dollars, par value, one hundred dollars each, and fifteen thousand dollars of this stock is *to be sold at par*, and ten thousand dollars will be left in the treasury for raising further funds if necessary.

"It is agreed by the board of directors that the subscriber of this fifteen thousand dollars will be paid his money back first before any dividends are paid on the

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promoter's stock, and that there is a sinking fund set aside for the actual daily rental expenses of the cost of the building to not be used for any other purposes until the fifteen thousand is paid back to the holders of the stock, who advanced the money and then the profits derived from the earnings shall be paid in weekly dividends for the whole stock.

"The board of directors shall meet once a week and declare such dividends as may be necessary from the profits derived.

"Name.	Residence.	Shares
.....	.....	.....
"M. Shaughnessy & Co.		10 shares
.....	.....	.....

The Simpson Catering Company fell into insolvency and August 6, 1904, Corinne Simpson, the president, by authority of the board of directors, executed a deed of assignment to plaintiff Mary B. Sherman, conveying to her all the assets for the benefit of creditors of the company. Plaintiff instituted this action as assignee, to recover from defendant, Martin Shaughnessy, \$1000, alleged to be owed by him for ten shares of stock subscribed for or agreed by him to be purchased, under the name of M. Shaughnessy & Co., the style under which he did business. It is important to state the dates when the so-called subscription paper was signed. The first two signers, signed February 20th and the remainder at dates ranging from March 3, 1904, to June 4th of said year. These dates are taken from a stock book of the Simpson Catering Company wherein shares were transferred to the various subscribers on the different days between the dates mentioned. Defendant's name does not appear on the stock book because, in fact, no shares ever were transferred into his name, nor was a certificate of shares ever issued to him; but he was solicited by Mrs. Simpson to take shares about the middle of April, and at that time signed the paper. It was in testimony that Jos. S. Laurie signed afterward, and

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induced Geo. P. B. Jackson to do so, and Laurie testified he signed in reliance on other persons having signed before, thereby becoming stockholders in the concern. Defendant testified as follows about how he came to sign the paper supra. He was engaged in the wholesale whisky business in St. Louis and also conducted the Lindell Hotel. Mrs. Simpson called on him three or four times about taking some stock and outlined the policy of the company, which was to deposit all the earnings in the Commonwealth Trust Company to pay the preferred shares. She presented a paper to defendant, saying if he would buy ten shares of the stock of the company, it would buy all its whiskies from him. Defendant looked over the paper and finally said to Mrs. Simpson, in substance, there was nothing to keep the officers from voting themselves any salary they wished out of the net earnings but she said they would not do that; that they would deposit their entire earnings with the Commonwealth Trust Company, the officers would receive only a small nominal salary, and they would buy all their whiskey from defendant. She told defendant she wished he would sign the paper for her as she had been greatly disappointed in trying to get things in shape. He declined to sign unless she would put her agreement in writing—*i. e.*, to buy all the whiskey the restaurant would use from him, the salaries of the officials should be nominal, and the earnings should be deposited with the Commonwealth Trust Company. She agreed to sign a paper containing those terms, but asked defendant to sign the paper supra, saying she would come around in a few days and execute his paper. He had an instrument drawn up, embodying the conditions on which he would take stock, as we have stated, and which instrument is in evidence. With the understanding that such an instrument should be signed by Mrs. Simpson for the company, defendant appended his signature to the above paper for ten shares of stock and either the day he did so or shortly afterward, Mrs. Simpson

returned to him on a matter of business, whereupon he presented her with the paper he had had prepared, showing the conditions on which he would take the stock. She became angry, refused to sign the paper, said she would have their agreement cancelled and walked out of the office. Defendant never saw her afterward, no stock certificate was issued to him, no stock was transferred to him on the books of the company, he never was called on to pay for any shares, never participated in any of the business of the company and the entire transaction passed out of his mind and was not remembered until he was called on by the assignee to pay one thousand dollars. It is in defendant's testimony, and there is none to the contrary, that when he presented the paper embodying the terms on which he would subscribe for or purchase stock from Mrs. Simpson, she said she would not sign it but would call the deal off and would cancel it. A ledger or stock book of the company was introduced in evidence and showed no shares of preferred or common stock in the name of defendant. Said ledger contained a list of the holders of preferred shares, running down to May 21, 1904, and amounting, we estimate, to \$15,600, of outstanding preferred shares, leaving \$9400 still in the treasury. Under date of April 19, 1904, the ledger showed \$11,300 of preferred shares in the hands of various parties, with \$13,700 of said shares still in the treasury. But during April, \$4300 preferred shares were taken by other persons, as shown by the ledger, and this would leave \$9400 in the treasury. The case was tried without a jury and at the conclusion of the evidence the court found the issues in favor of defendant and entered judgment accordingly, no declarations of law having been requested by either party.

Neither Mrs. Simpson, nor the Catering Company ever regarded defendant as a shareholder and neither did he regard himself in that light. Everything that transpired points to this conclusion, which the court,

as trier of the facts, might draw, even if we allow it was not bound to be drawn. Failure to issue a certificate to defendant, to name him as stockholder along with the others on the books of the company, to call on him for payment until he was sued in the present action years after the date of his alleged subscription, are incompatible with the idea that he was looked on as a stockholder. Mrs. Simpson said when she refused to sign the paper she had agreed to sign, the matter of his taking stock would be declared off and the whole transaction cancelled. These being the circumstances in proof, they did not constitute a contract of subscription that would render defendant liable even at the suit of creditors or of an assignee for their benefit clothed with full power to represent them, as plaintiff is clothed under our statute as it now stands. [R. S. 1899, sec. 365; Grand Avenue Bank v. St. Louis Union Trust Co., 135 Mo. App. 366, 115 S. W. 1071.] The abortive transaction between defendant and Mrs. Simpson ought not to be regarded as even an attempt on his part to subscribe for capital stock of the company, and though the papers said the signers subscribed and agreed to pay for shares, the essential nature of the transaction as shown by the facts, ought to be determined and allowed to control the decision. The statutes regarding manufacturing and business companies, provide how stock shall be subscribed, and who shall be the subscribers in the first instance; saying, among other things, the articles of association of the company shall state the number of shares into which the stock is to be divided, the par value thereof, that the same has been *bona fide* subscribed and one-half paid up in lawful money of the United States, that the articles shall show the names and places of residence of the shareholders and the number of shares subscribed by each; further, that if it is desired to class part of the shares as preferred, the articles shall set out the amount of the preferred stock and the number of shares subscribed by every sub-



scriber. [R. S. 1899, sec. 1312.] When the Simpson Catering Company was organized, all the shares were subscribed as common stock by Mrs. Simpson, Morgan and Hoge, the former taking all but two shares. It is manifest, therefore, defendant did not subscribe originally for any of the capital stock, which be it noted, was all common stock. The scheme for the creation of preferred shares must have been an afterthought or else they were illegal. By the very words of the statute if it was desired when the corporation was organized to have preferred stock, the articles of association were required to show this and show who had subscribed for said stock. The company was incorporated February 19, 1904, and immediately afterward, on the 20th, the scheme was devised, or at least acted upon, to constitute part of the stock preferred. This scheme was for Mrs. Simpson to turn over \$25,000 shares par value of her stock to the company, of which \$15,000 would be sold at par immediately and \$10,000 left in the treasury for raising further funds. The \$15,000 worth of shares so to be sold were to be given a preference in this way: The subscribers for those shares were to be paid back their money before any dividends were paid on the promoters' stock. It was not contemplated these preferred shares should be subscribed for in the sense subscriptions were taken to the original capital stock; in fact, that would have been an impossibility; for all the capital stock had been previously subscribed. What was contemplated and intended was a sale of the shares turned into the treasury by Mrs. Simpson. This was declared in so many words in the resolution of the then shareholders of the company on February 20th, wherein it was voted and carried that twenty-five thousand dollars of the stock of the Simpson Catering Company be set aside as treasury stock *to be sold* for the purpose of raising funds. That motion was adopted at the same meeting when it was voted the transfer of the World's

Fair Concession by Mrs. Simpson to the company should be in full payment of the entire capital stock. Plainly, the company and all of the then shareholders, intended the treasury stock should be sold, for they so stated, and what defendant intended to do was to buy ten shares of it on certain conditions; at any rate the court, as trier of the facts might thus find, for defendant so testified, testifying further Mrs. Simpson solicited him to buy. Looking on his transaction with her as an attempt to sell, it is governed of course, by the law of sales of personal property generally; one part of which is that a person to whom a seller proposes to dispose of an article, may buy on any terms he wishes, provided the seller will assent to them. The condition on which defendant was willing to buy was that Mrs. Simpson, who was representing the company in an attempt to sell to him, should sign a paper in behalf of the company by which it would agree to buy all the whiskey it would use from defendant; agree, further, the salaries of the officers should be nominal (to-wit, at a sum agreed on between Mrs. Simpson and defendant) and that the company should deposit all its net earnings with the Commonwealth Trust Company for paying off the preferred stock at the close of the World's Fair. Mrs. Simpson agreed to sign such a paper as part of the contract for the sale to defendant of ten shares of stock, but she subsequently refused to sign it, and we see no possible conclusion except that, as she said, this ended the proposed sale and cancelled the matter; the contract not having been fully executed. [1 Cook, Corporation, sec. 137, p. 398.] To hold defendant responsible on those facts would be to carry into effect as a complete agreement, one that broke down because a party to it repudiated the main condition on which it was understood it should become effective. That stock may be turned in to a company by the original subscribers to be held and sold by the company as treasury stock is settled law and such a transaction has been recognized

as valid by the courts. [1 Cook, Corp. (6 Ed.), sec. 46, p. 182; Lake Superior Iron Co. v. Drexel, 90 N. Y. 87; Ins. Press v. Montauk, etc., Co., 103 N. Y. App. Div. 472, and other cases cited in note.] And that the conditions and promises assented to by the company in the purchase of treasury stock are concurrent and dependent, so that neither party can require the other to perform without first offering to perform himself, has been ruled; as it naturally would be, inasmuch as a contract of sale must be enforced according to its terms, if at all. [Railroad v. Robbins, 23 Minn. 439; Baltimore, etc., Railroad v. Hambleton, 77 Md. 341; Green v. Sigua Iron Co., 88 Fed. 203; Id., 104 Fed. 854.] It is also the law that fraudulent representations which induce a purchase of corporate stock, constitute a good defense against an action for the price. [Tinker v. Kier, 195 Mo. 183, 94 S. W. 501.] However, the decision ought not to be put on the ground that defendant was induced to buy the stock by fraudulent representations; but rather on the ground that he was induced to sign the paper wherein he appeared to subscribe or purchase, by Mrs. Simpson's promise to sign another paper as part of the transaction which should set forth the terms of the deal, and that Mrs. Simpson repudiated her promise, not with an intention to defraud defendant as a purchaser, but rather because, on reflection, she preferred to let the sale fall through. Properly regarded the case is totally different from cases in which the facts showed the defendants had subscribed originally for part of the capital stock of the company and where the action was for the price of the subscription. This distinction has been noticed in numerous decisions and where the contract is essentially one of purchase, even if it is a completed contract, it is held the purchase price cannot be recovered without a tender of the stock. [Wood Harv. Co. v. Jefferson, 57 Minn. 456; Clark v. Improvement Co., 57 Ind. 135; Thrasher v. Railroad, 25 Ill. 393; Gettysberg Nat'l Bank v. Brown, 95 Md. 367.] Plaintiff re-

lies on various authorities, including the following: New Lindell Hotel Co. v. Smith, 13 Mo. App. 7; Kirkwood, etc., Co. v. Van Ness, 61 Mo. App. 361; Shelby Co. v. Railroad v. Crow, 137 Mo. App. 461, 119 S. W. 435; Business Men's Assn. v. Williams, 137 Mo. App. 575, 119 S. W. 439; Kansas City Hotel Co. v. Hunt, 57 Mo. 126; Haskell v. Worthington, 94 Mo. 560, 7 S. W. 481. Those cases are totally unlike this one in two regards: The contracts sued on were subscriptions to the original capital stock of the company, or else to an increase of the capital stock, and it appeared the subscriber had been recognized as a stockholder and had acted as such, thereby estopping him to deny he had taken shares even though no certificate had been issued to him. The most essential difference is that the contracts declared on were complete contracts, or else constituted subscriptions to the stock. As there was no complete contract to purchase, the judgment should be affirmed.

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EDGAR WILBURN, Respondent, v. WABASH RAIL-  
ROAD COMPANY et al., Appellants.

St. Louis Court of Appeals, May 31, 1910.

1. **COMMON CARRIERS: Carriage of Freight: Delay: Liability of Connecting Carrier.** Where an initial carrier and a connecting carrier had an arrangement for the transportation of live stock at a through rate, the connecting carrier, if guilty of delay in transporting, was liable for the damages sustained.
2. ———: ———: ———: ———: **Question for Jury.** Whether a delay of ten to thirteen hours in the transportation of live stock by a connecting carrier was beyond its power to prevent, or because it did not transport the stock by the first available train, *held*, under the evidence, for the jury.
3. ———: ———: ———: ———: **Terminal Carrier: Agency.** Where an initial carrier and a connecting carrier made an arrangement for transportation of live stock at a through rate, a part of which went to a terminal carrier with whom the connecting carrier had an agreement for sending its

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freight by the terminal carrier on payment of a fixed compensation, the terminal carrier was, in the absence of any showing to the contrary, the agent of the connecting carrier, so that the latter was liable for any delay of the terminal carrier in transporting cattle.

4. ———: ———: ———: Joinder of Initial and Connecting Carriers: Carrier Guilty of Negligence Liable: Statute. Under section 5022, Revised Statutes 1899, as amended by Laws 1905, p. 54, authorizing a shipper suing for injury to freight to join as defendants the original carrier and all connecting carriers and to recover from the carrier through whose negligence the loss was sustained the amount thereof, a shipper of live stock who sues the initial and connecting carriers jointly for damages occasioned by a delay in transportation may only recover from the carrier responsible for the delay.

Appeal from Audrain Circuit Court.—*Hon. Jas. D. Barnett*, Judge.

REVERSED AS TO ST. LOUIS AND HANNIBAL RAILWAY COMPANY.

AFFIRMED AS TO WABASH RAILROAD COMPANY.

*J. L. Minnis and Robertson & Robertson* for appellant, Wabash Railroad Company.

(1) The court erred in permitting the plaintiff to testify to conversations with the agent at Perry, Missouri. All such conversations were merged into the written contract. *Ingwerson v. Railroad*, 103 S. W. 1143; *Henning v. Ins. Co.*, 47 Mo. 425; *Sticks v. Matthews*, 75 Mo. 96; *Weil v. Posten*, 77 Mo. 284; *Clements v. Yates*, 69 Mo. 623. (2) The defendants are connecting carriers and not partners. Sec. 13, Art. 12, Const. of Mo., secs. 1122, 1132, 1134, 1138, 1139, 5222, R. S. 1899; *Moore on Carriers*, sec. 24, p. 491; *McCann v. Eddy*, 133 Mo. 59; *Grain Co. v. Railroad*, 176 Mo. 480; *Hutchinson on Carriers*, secs. 164-171; 6 Cyc. 478; *Live Stock Co. v. Railroad*, 87 App. 330; *Shewalter v. Railroad*, 84 Mo. App. 589; *Thomas v. Railroad*, 109 Mo. 204; 1 *Lindley on Partnership* (Ewell), secs. 1 and 2; *Ashby*

v. Shaw, 82 Mo. 76; Wetmore v. Crouch, 55 Mo. App. 441. (3) Plaintiff failed to comply with the terms of the contract by filing any claim for damages with the general freight agent of the St. Louis & Hannibal Railway Company within ten days. There is no evidence whatever in the case showing that this was waived by either defendant. This provision of the contract has been universally upheld. Davis v. Railroad, 99 S. W. 17; McBeth v. Railroad, 20 Mo. App. 445; Brown v. Railroad, 88 Mo. App. 568; Smith v. Railroad, 112 Mo. App. 610; Bank v. Railroad, 119 Mo. App. 1; Hamilton v. Railroad, 80 Mo. App. 597. Under the terms of the contract of shipment read in evidence the giving of such notice and making claim as provided is a condition precedent to the shipper's right to recover damages caused by delay. Bank v. Railroad, 119 Mo. App. 1. There is no testimony whatever that plaintiff ever complied with those terms of the contract. (4) This defendant was under no obligation to stop its freight trains to pick up stock along its line otherwise than by its scheduled trains. Hutchinson on Carriers, sec. 97. In the absence of a contract with the Wabash Railroad Company to transport his stock by special train, he has no cause of complaint when it was shipped by its first train going in the direction of his market. Dawson v. Railroad, 79 Mo. 296; Ballentine v. Railroad, 40 Mo. 491. A railroad company has the right to appropriate a portion of its trains to carry freight, others to be carriage of passengers, and has a right to have such freight trains stop only at such stations as it may designate by its time tables. 2 Rorer on Railroads, pp. 945, 946; Moore on Carriers, p. 105; 5 Am. and Eng. Ency. of Law (2 Ed.), 163.

*J. D. Hostetter* for appellant, St. Louis & Hannibal Railway Company.

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*E. S. Gantt* for respondent.

(1) It is well settled that where common carriers each having its own line formed, what to the shipper is a continuous line and contracted to carry goods through for an agreed price which the shipper pays in one sum and which the carriers divide among themselves, they are jointly and severally liable to the shipper with whom they have contracted for a loss taking place on any part of the whole line. *Eckles v. Railroad*, 112 Mo. App. 240; *Wyman v. Railroad*, 4 Mo. App. 35; *Barrett v. Railroad*, 9 Mo. App. 226; *Cherry v. Railroad*, 61 Mo. App. 303; *Shewalter v. Railroad*, 84 Mo. App. 589; *Live Stock Co. v. Railroad*, 87 Mo. App. 334; *Champion v. Bostwick*, 11 Wend. 571, 18 Wend. 157; *Pattison v. Blanchard*, 1 Seld. 186; *Cobb v. Abbot*, 14 Pick. 289; *Railroad v. Spratt*, 2 Dwall. 4; *Black v. Railroad*, 139 Mass. 308; *Hart v. Railroad*, 8 N. Y. 37; *Hutchinson on Carriers* (3 Ed.), secs. 250-255; *Weyland v. Elkins Holt*, N. P. 227; 1 Starkie 272; *Laughter v. Pointer*, 5b and c, 547; *Carter v. Peck*, 4 Sneed 203; *Cobb v. Abbott*, 14 Pick. 289; *Fromont v. Coupland*, 2 Bing. 170; *Rocky Mt. Mills v. Railroad*, 119 N. Car. 693, 26 S. E. Rep. 854 and 856; Ann. St. Rep. 682. (2) The rule is well established that, while a common carrier cannot be compelled to do so, it may contract to carry the goods to a point beyond the terminus of its own line and thus assume all of the obligations of the whole route so as to become liable at the commencement and will continue throughout the entire transit. Where it so undertakes to transport the goods throughout to its destination, all connecting carriers employed in transferring and completing such transportation become agents of the initial or contracting carrier, for whose defaults the initial or connecting carrier is responsible to the owner of the goods. *Ingwerson v. Railroad*, 116 Mo. App. 139; *Bank v. Lome*, 119 Mo. App. 1; *Hardin v. Railroad*, 120 Mo. App. 203; *Buffington v. Railroad*, 118 Mo. App. 476; *Davis v. Railroad*, 126 Mo. 69, 28 S. W. 965; *Eckles v.*

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Railroad, 112 Mo. App. 240, 87 S. W. 99; Eckles v. Railroad, 72 Mo. App. 296; Lesnisky v. Great Western Dispatch, 10 Mo. App. 134; Clothing Co. v. Merchants Dispatch, 106 Mo. App. 487; Hendrix v. Railroad, 81 S. W. 226, 107 Mo. App. 127, 80 S. W. 970; Hutchinson on Carriers (3 Ed.), 226-230. (3) The shipping contracts included in counts 1 and 2 have been construed by this court and held to be contracts for a through shipment. Ingwerson v. Railroad, 116 Mo. App. 139; Bank v. Railroad, 119 Mo. App. 1.

GOODE, J.—Action for loss on the price of several carloads of cattle, caused by the negligent delay of defendants in transporting them from Perry, Missouri, to National Stockyards, Illinois. The cattle were shipped June 19, 1904, from Perry, a station on the line of defendant, the St. Louis & Hannibal Railway Company. The line running through Perry is a branch which connects with the main line of that company at New London, and from the latter station the cattle were hauled by it to Gilmore, the terminus of its line, and where connection is made with the line of defendant, Wabash Railroad Company. From Gilmore the Wabash Company carried the cattle to Luther, or a mile or so south of Luther, and turned them over to the Terminal Association, which carried them across the Mississippi river to the National Stockyards. Plaintiff hired a special train at Perry to haul the cattle to New London, there being no regular freight train of the St. Louis & Hannibal Company leaving said station on the day of shipment. This circumstance had nothing to do with the delay, for the cattle reached New London on the main line of said company on time, and caught the regular freight train from New London to Gilmore, arrived at the latter point on time and were immediately turned over to the Wabash Company. They reached Gilmore at 10:30 p. m., June 19th, and lay there until 8:30 the next morning, or ten hours. Meanwhile two freight



trains passed, but the Wabash agent said they were overloaded. From one to three hours delay occurred between Gilmore and Luther. The trainmaster of the Wabash Company testified the cattle were taken from Gilmore by the first "available train;" but the only reason shown why the two trains which passed, one at twelve and the other about two o'clock of the night the cattle reached Gilmore, did not take up the cattle in question, was they were overloaded. There is some testimony to prove delay of an hour occurred on the Terminal Association's line after the cattle were turned over to it by the Wabash Company, which was at 1:12 o'clock, June 20, 1904. The cattle did not get to the National Stockyards until three o'clock, when the market for the day was over and they had to be sold the next day at a lower market. It should be stated the testimony shows without dispute there was an arrangement between the St. Louis & Hannibal Company and the Wabash Company by which cattle were "billed through" by the St. Louis & Hannibal Company from Perry to the National Stockyards, at a through rate for the whole distance, of which four dollars went to the Terminal Association or the ferry company at St. Louis—the carrier chosen by the Wabash Company to transport the cattle across the Mississippi river. Plaintiff's cattle were billed through pursuant to the arrangement between the defendants. As regards the connection of the Terminal Association, which transported the particular shipment over the river with the arrangement between the two defendants, Richard Burger, freight accountant of the Wabash Company, testified four dollars was charged as a toll for carriage across the river; that the bridge company was not "consulted in the matter of the authority of the St. Louis & Hannibal Company to bill through to the National Stockyards;" that there was an arrangement between the Wabash Company "and the bridge or ferry company, whereby the Wabash Company may send its freight over the bridge or ferry on payment of a certain

compensation." There is no proof the Terminal Association (otherwise called the Bridge Company) occupied any position in respect of the shipment, than agent for the Wabash Company. This action for damages was instituted against the St. Louis & Hannibal Company and the Wabash Company, and the issues joined by the pleadings would make it similar to *Crocket v. Railroad*, 147 Mo. App. 347, 126 S. W. 243, but for two reasons: The bills of lading were not introduced in evidence in the answer; and the testimony conclusively proves the negligent delay happened after the cattle had been delivered by the first carrier, the St. Louis & Hannibal Company, to the Wabash Company. That is to say, the delay, if caused by the fault of either carrier which handled the freight, is to be ascribed to the fault of the Wabash Company or its agent, the Terminal Association. Therefore the various points discussed in the briefs regarding the instructions and contention that the right to recover depended on the two defendants being partners, or on a joint undertaking by them to transport the cattle, are immaterial. Whatever the facts about those matters may have been, it is certain the Wabash Company was answerable for losses due to its own carelessness, or the Terminal Association's. *Halliday v. Railroad*, 74 Mo. 159, 162.] The question of whether the loss occurred from the fault of the Wabash Company was left to the jury in an instruction too favorable to that defendant; for it was exonerated from delays caused by the Terminal Association. The court instructed there was no evidence the Wabash Company made a contract with plaintiff to ship cattle from Perry to the National Stockyards; that all the proof showed was merely that said company was a line connecting with the St. Louis & Hannibal Company's line at Gilmore and with the Terminal Association's line at Grand avenue, in St. Louis; that the Wabash Company was not liable for any delay on the line of the St. Louis & Hannibal Company or the Terminal Bridge Company east of

Grand avenue; that the Wabash Company did not agree with plaintiff it would transport the cattle over its line at any particular time, or would deliver them to the Terminal Company at Grand avenue at any particular time, or agreed to deliver to the National Stockyards; that though the jury might find there was a delay at Gilmore after the cattle were delivered to the Wabash Company, yet if they further found the Wabash Company moved said stock in the first available train going eastward that could take the stock, and delivered the same in a reasonable time to the Terminal Company at Grand avenue, the verdict should be in favor of the Wabash Company. It will be perceived said instruction exonerated the Wabash Company unless the delay was due to some omission of duty on its part, as the evidence well nigh certainly proved was the case. It did prove certainly a delay of from ten to thirteen hours occurred while the cars were in said company's charge, and it was for the jury to say whether this was because it did not ship the cattle from Gilmore by the first available train and thereafter deliver them within a reasonable time to the Terminal Association, or whether the delay was beyond its power to prevent. If the Wabash Company was remiss, as the jury found, but nevertheless the stock would have reached the National Stockyards for the market of the 20th, but for subsequent delay on the Terminal Association's line, this fact is no defense; because, on the record, the Wabash Company was responsible for the default of the Terminal Company, if such there was.

The judgment against the Wabash Company was right and will be affirmed. It will be reversed as against the St. Louis & Hannibal Company, because the evidence shows said company was not in default, and plaintiff having elected to sue both the carriers jointly, his recovery must be restricted to the one proved to be responsible for the delay. [R. S. 1899, sec. 5022, as amended by Laws 1905, p. 54.] All concur.

In re Estate of WILLIAM STREET, Deceased. DANIEL M. STOUT, etc., Appellant, v. MARY McCUNE et al., Respondents.

St. Louis Court of Appeals, May 31, 1910.

**JURISDICTION:** Supreme Court: Title to Land: Question Involving Construction of Homestead Laws. Where the point of law in issue is whether, under the Homestead Statutes of 1895, the heirs of a deceased took the homestead in fee, free from the demands of creditors of decedent, or whether it was subject to be sold for his debts, a question of title to real estate is involved, and hence the Supreme Court has jurisdiction of the appeal.

Appeal from the Ralls Circuit Court.—*Hon. David H. Eby*, Judge.

TRANSFERRED TO SUPREME COURT.

*J. O. Allison* and *E. L. Corwine* for appellant.

*Reuben F. Roy* for respondents.

GOODE, J.—Daniel M. Stout, public administrator of Ralls county, having in charge the estate of William Street, deceased, applied to the probate court of said county for an order to sell certain real estate whereof the deceased died seized, to-wit, all of lot 30, block 9, in the city of New London. The application showed there were unpaid allowances against the estate, which the personal assets would not suffice to discharge; further, that the deceased left a widow who was dead when the application was made, and that his only surviving children and heirs were his two daughters, Mary McCune and Emma Wood, both residents of Ralls county. The application for the order was submitted on the following agreed facts:

"1. That there are unpaid judgments and allowed demands against said estate as is alleged in said application and as fully appears therein.

"2. That the personal property of all kinds left by said deceased, did not exceed in value the sum of \$400, and that said deceased left surviving him a widow, who, upon his death, took possession of all said personal property as her own under the statute.

"3. That said deceased died seized and possessed in fee simple of the real estate described in said application as therein alleged.

"4. That said real estate is situated in the city of New London, Missouri, a city of less than ten thousand inhabitants, and comprises less than five acres of ground and did not exceed in value at the time of the death of said deceased the sum of \$1500.

"5. That said deceased departed this life on the 31st day of July, 1903, and that his widow departed this life on the —day of—, in the year 1906.

"6. That said deceased left surviving him as his heirs, his two daughters, both of whom at the time of his death were of full legal age.

"7. That said William Street acquired said land by conveyance by deed dated June 16th, 1890, and filed for record July 16th, 1892, in the office of the recorder of deeds of said Ralls county, and is recorded in said office in book 45, at page 436, and said land was the homestead of said Street from said last named date until his death.

"8. That the indebtedness of said deceased upon which the judgments and allowed demands alleged in said application are based, originated since January 1st, 1896.

"9. That said William Street was the head of a family from said July 16th, 1892, until his death in 1906, and during all said time lived on said land in his residence with his family consisting of his wife and two daughters, to-wit: Emma Wood and Mary McCune,

which last named two were the only children and sole heirs of said William Street, both of said daughters, however, being of full legal age at the time of the death of said William Street, as hereinbefore stated."

The proceeding reached the circuit court where judgment was entered denying the application and thence an appeal was taken to this court. The daughters contested the right to sell the lot for the payment of debts of the deceased, on the ground it was the homestead of the deceased and not subject to sale for his debts. It was held in *Snodgrass v. Copple*, 203 Mo. 480, 101 S. W. 1090, that the jurisdiction of an appeal from an adjudication on a motion to quash an execution levied on a homestead during the lifetime of the debtor and owner of the homestead, is in the courts of appeals, and not in the Supreme Court. But in *Brewington v. Brewington*, 211 Mo. 48, 109 S. W. 723, it was sought to partition a homestead before the minor children of the deceased had attained their majority, and it was held the jurisdiction of the appeal was in the Supreme Court. The opinion treated a proceeding affecting the right of the widow and children to a homestead estate after the death of the head of the family, as one involving the title to real estate within the meaning of the constitutional clause lodging jurisdiction of appeals in such cases in the Supreme Court. The point of law at issue in the present case is whether under the Homestead Statutes of 1895, the heirs of the deceased took the homestead in fee free from the demands of creditors of the father, or whether it is subject to be sold for his debts. According to the *Brewington* case, this controversy is over an estate in land and not over an exemption privilege. Hence the title to real estate is involved, and the cause will be ordered transferred to the Supreme Court. All concur.

J. J. BICK, Appellant, v. CHARLES H. DIXON,  
Respondent.

St. Louis Court of Appeals, May 31, 1910.

1. **PLEADING: Prayer: Does not Control Relief to be Granted.** Generally speaking, the prayer for relief in a pleading does not control the form of relief to be granted, but any relief consistent with the facts alleged may be granted.
2. ———: ———: **Change in Prayer: Departure.** It is not conclusive on the question whether an amended petition changes the cause of action first stated that it closes with a prayer materially different from the prayer of the original petition, if the two pleadings are otherwise alike.
3. ———: ———: **Governs Relief Granted, How Far.** The prayer of a petition may sometimes determine the character of the proceeding and the relief that may be accorded, and this is so when the petition states facts consistent with the prayer for relief, which is specific, and to grant relief not prayed for and not contemplated by plaintiff in stating his case would surprise defendant and deprive him of some right of procedure he is entitled to.
4. **JUDGMENTS: Scire Facias: Exclusive Remedy.** *Scire facias* is the only mode of reviving a judgment.
5. **PLEADING: Action on Judgment: Changing Prayer for Relief: Departure.** In an action on a justice's judgment, where the prayer of the first petition contained words suggestive of a proceeding to revive the justice's judgment and also words suggestive of a suit upon said judgment but did not pray for a writ of *scire facias* and no such writ was issued, an ordinary summons being issued, the case stood as an action on the justice's judgment, and an amended petition, which differed from the original one only in the omission of words appropriate in a prayer to revive a judgment by *scire facias*, did not change the cause of action.

Appeal from Monroe Circuit Court.—Hon. David H.  
Eby, Judge.

REVERSED AND REMANDED.

*Thomas P. Bushaw* for appellant.

(1) The amended petition was not a departure. "There are two tests which determine whether a second petition is an amendment or new cause of action. First, whether the same evidence will support both petitions; and, second, whether the same measure of damages will apply to both. If these questions are answered in the affirmative it is an amendment; if in the negative, it is a substitution." *Liese v. Meyer*, 143 Mo. 547; *Burnham v. Tillery*, 85 Mo. App. 453; *Grigsby v. Barton County*, 169 Mo. 221; *Boecker v. Milling Company*, 101 Mo. App. 136. (2) The original petition was a suit on a judgment and defendant brought in on a summons. The amended petition declares on the same judgment. The same proof is required to support both and the dropping of unnecessary words from the prayer of the amended petition makes no change in the cause of action. (3) The rule as to amendments or changes in the prayers to petitions is liberal. Thus, in an action for a breach of contract of marriage, aggravated by seduction, changing prayer for relief in the petition from one for damages caused by the seduction to one for damages for breach of contract to marry, is an amendment and not a change of the cause of action." *Liese v. Meyer*, 143 Mo. 547; see also *Howard v. Shirley*, 75 Mo. App. 150.

GOODE, J.—This appeal was taken from a judgment on a motion to strike out an amended petition, which motion was sustained on the ground the amendment substituted a new cause of action. Plaintiff having elected to stand on the amended petition, judgment was rendered against him, dismissing his action and for costs.

The first petition alleged plaintiff had obtained judgment before a justice of the peace May 22, 1897, for \$84.30, against defendant, with eight per cent interest to



compound annually, and for costs; that a transcript of said judgment was filed in the office of the clerk of the circuit court July 3, 1900, which judgment, damages, interest and costs never had been paid, vacated, appealed from or satisfied, and the same was due, owing and unpaid and aggregated \$175; "for which plaintiff asks revival, renewal, lien thereof to be continued and prays for final judgment at eight per cent interest to compound annually and for costs of suit." Defendant was brought into court by service of summons and answered by general denial and plea of the five-years Statute of Limitations. Afterwards he filed an amended petition which differed in no material respect from the original one, except in the form of the prayer, and this will be recited: "For which amount plaintiff asks and prays for judgment against defendant, with eight per cent interest to compound annually, and for costs of suit." On motion of defendant the amended petition was struck out for seeking judgment on the justice's judgment; whereas the first petition had sought to revive the justice's judgment. Generally speaking the prayer for relief does not control the form of relief to be granted, and any consistent with the facts alleged may be awarded. [Kneale v. Price, 21 Mo. App. 295; State ex rel. v. Lumber Co., 180 Mo. 53, 79 S. W. 454.] Nor is it conclusive on the question whether an amended petition changes the cause of action first stated that it closed with a prayer materially different from the prayer of the original petition, if the two pleadings are otherwise alike. [Liese v. Meyer, 143 Mo. 547, 45 S. W. 282.] It has been held the prayer may sometimes determine the character of the proceeding and the relief that may be accorded; and we understand the Supreme Court to mean this is so when the petition states facts consistent with the prayer for relief, which is specific, and to grant relief not prayed for and plainly not contemplated by the

plaintiff in stating his case, would surprise the defendant and deprive him of some right of procedure he is entitled to; as, where the entire theory of the case was for relief in equity and that relief was prayed, though relief at law might be consistent with the facts alleged, it will not be given. [Rush v. Brown, 101 Mo. 586, 45 S. W. 735.] The prayer of the first petition in this case contained words suggestive of a proceeding to revive the justice's judgment, and also words suggestive of a suit upon said judgment; that is to say, it asked for revival of the judgment and continuance of its lien, and at the same time prayed judgment for the amount of the justice's judgment at the time the suit was filed. It will be observed the first petition did not pray for the writ of *scire facias*, which is the only mode of reviving a judgment. [Armstrong v. Crooks, 83 Mo. App. 141; Holt v. Mansfield, Id. 191.] Instead of a *scire facias* being issued, an ordinary summons was issued, and, in point of fact, the case stood as an action on the justice's judgment. The only change in the amended petition worth noticing was the omission of the words appropriate in a prayer to revive a judgment by *scire facias*. Inasmuch as the first petition stated facts to warrant a judgment by the circuit court for the amount of the justice's judgment, and that relief was prayed, we think the amendment to cure the inconsistency of the prayer did not change the cause of action, but was proper, and as no *scire facias* was asked or issued so as to give the proceeding the effect of one to revive the justice's judgment, perhaps the words of the prayer which looked to that relief might have been disregarded as surplusage. [McGlothlin v. Henry, 44 Mo. 250.] Therefore the judgment will be reversed and the cause remanded. All concur.

ANNA F. RHOADES et al., Respondents, v. RICHARD  
M. BUGG, Appellant.

St. Louis Court of Appeals, May 31, 1910.

1. **LIBEL AND SLANDER: Slander of Title: Written Words.**  
"Slander of title" differs from slander of person in that it may be the result of written as well as of spoken words.
2. ———: ———: **Language Necessary to Constitute Defamation.**  
There must be a defamation of title by language before an action for slander will lie; so that where defendant maliciously asserted title to ground by driving stakes in it, when he knew he had no title, for the purpose of preventing plaintiff from selling, and succeeded in accomplishing that purpose, an action for slander of title will not lie.
3. ———: ———: **Changing Theory: Trespass on the Case: Pleading.** Where an action was plainly one of slander of title, on failing to prove the slander, plaintiff could not recover as in trespass on the case.

Appeal from Washington Circuit Court.—*Hon. Jos. J. Williams*, Judge.

REVERSED AND REMANDED.

*James F. Green, Dinning & Dinning*, and *Edward T. Eversole* for appellant.

(1) The petition of plaintiffs does not state facts sufficient to constitute the cause of action attempted to be stated. The petition alleges an oral agreement to sell the land to Casey, and further that the oral agreement was not in writing, which agreement set up in the petition is within the Statute of Frauds and could not have been enforced by plaintiffs, hence, they had no right of action against defendant. *Brentman v. N. Y. City Ct. Trt.*, 3 N. Y. Sup., p. 420; *Burkett v. Griffith*, 90 Cal. 533; *Walkley v. Bostwick*, 49 Mich. 374; *Paull v. Halperty*, 63 Pa. St. 46; 25 Am. and Eng. Ency. of Law (2 Ed.), p. 1077, sec. 5. (2) To maintain an action for

slander of title the plaintiff must establish (a) that the words were false. *Edwards v. Bussis*, 60 Cal. 160; *Butts v. Long*, 106 Mo. App. 313; *Like v. McKinstry*, 41 Barb. & N. Y. Rep., 186; *Kendall v. Stone*, 5 N. Y. 16; *Dodge v. Colby*, 108 N. Y. 445; *Hill v. Ward*, 13 Ala. 310; *McDaniel v. Baca*, 2 Cal. 329; *Griffon v. Bank*, 12 La. 5. (b) That they cause an injury to plaintiff in reference to his title to the property. *Beach v. Raney*, 2 Hill (N. Y.) 309; *Crain v. Petrie*, 6 Hill (N. Y.) 524; *Collins v. Whitehead*, 34 Fed. Rep. 121; *Tobias v. Harland*, 4 Wend. (N. Y.) 537; *Hartley v. Herring*, 8 Term Rep. 130; *Pollars v. Lion*, 91 U. S. 225. (c) That they were uttered maliciously and in order to injure the plaintiff. *Kendall v. Stone*, 5 N. Y. 19; *Vantuil v. Riner*, 3 Ill. App. 556. (d) An action for slander to title must be grounded on malice. *Walkey v. Bostwick*, 49 Mich. 374, and the burden of proving malice, either express or implied, is on the plaintiff in order to sustain the action. *Sike v. McKinstry*, 3 Abb. N. Y. App. 62; *Hargreave v. LeBreton*, 4 Burr 223; *Baley v. Dean*, 5 Barb. (N. Y.) 297; *Stock v. Chetwood*, 5 Kan. 141. (e) The plaintiffs must show title to the land or an interest therein. (f) That there was a want of probable cause that defendant believed that he owned the land. (3) There is no evidence that defendant said or did anything relating to the personal property described in the petition which was included in the oral agreement to sell to Casey and a part of which was included in the sale to Blount & Bust. Indeed, the petition does not charge any slander of the title to any part of the personal property, and the proof shows conclusively that defendant did not claim any of the land described in the deed to Mr. Casey or in the deed to Blount & Bust, nor that contained in the plaintiffs' amended petition before it was amended the second time after plaintiffs' evidence was in and the defendant had filed a demurrer thereto.

*M. E. Rhodes, E. M. Dearing and Byrns & Bean*  
for respondents.

(1) It makes no difference that the original contract of sale between L. W. Casey and the agent of plaintiffs (*M. E. Rhodes*), was not enforceable for want of satisfying the Statute of Frauds. *Pollock on Torts* (1887 Ed.), p. 261; *Webbs Pollock on Torts*, p. 389; *Rice v. Manley*, 66 N. Y. 82; *Benton v. Pratt*, 2 Wend. 385; *Green v. Button*, 2 Cr. M. & R. 707; 16 Am. and Eng. Ency of Law (2 Ed.), p. 1111. (2) "So it formerly seems to have been supposed that the only ground of damages was loss of sale, or leasing the property, the title to which was assailed; it is, however, well settled at this day that any loss which is a natural and proximate consequence of the language is damage." *Townshend on Slander and Libel* (4 Ed.), 290; *Newell on Slander and Libel* (2 Ed.), p. 205, sec. 3. (3) In actions for damages for defaming title it is essential that the defamatory matter be false and malicious, and the jury in its discretion may award punitive damages in addition to the actual damages sustained by the plaintiff. 25 Am. and Eng. Ency. Law (2 Ed.), 1080, sec. b; *Hopkins v. Drowne*, 21 R. I. 20; *Kendall v. Stone*, 2 Sandf. (N. Y.) 269; *Van Tuyl v. Riner*, 3 Ill. App. 556; *Hicks Bros. v. Mill Co.*, 57 L. R. A. 720. (4) In *Benjamin Davidson's* lifetime, defendant, by license from Davidson, occupied a part of the strip of land in dispute with wagon scales. Davidson's death terminated such license. Defendant then negotiated with Ed Davidson for the purchase of the ground in dispute. Failing in that he then accompanied his false claim of title with trespass by setting up stakes on plaintiff's premises for the purpose, as defendant testified, "to let the purchaser know what he had bought." Such false and malicious claim of title by defendant accompanied by trespass, made the case properly one for punitive damages. *Hicks Bros. v. Mill Co.*, 57 L. R. A. 720;

**Parker v. Shackelford**, 61 Mo. 68; **Newman v. Railroad**, 2 Mo. App. 402; **Buckley v. Knapp**, 48 Mo. 152. (5) Punitive or exemplary damages may be recovered in this State where the act complained of has been maliciously done. That is, an intentional wrongful act without just cause or excuse will warrant the jury in finding punitive damages. **McNamara v. Transit Co.**, 182 Mo. 680; **Trauerman v. Lippincott**, 39 Mo. App. 486; **Isreal v. Isreal**, 109 Mo. App. 374. Actual or express malice means an intentional wrongful act without just cause or excuse. **Nelson v. Wallace**, 48 Mo. App. 201. The case at bar was based on such actual or express malice and there was ample evidence to prove it, therefore plaintiff's instruction on punitive damages was proper. **Carp v. Insurance Co.**, 203 Mo. 356; 25 Am. and Eng. Ency. Law (2 Ed.), p. 1083, sec. 6.

**STATEMENT.**—Action for damages for slander of title. The petition avers plaintiffs, in March, 1907, were the owners in fee simple of a lot of ground in the town of Potosi, described as follows: "Part of lot No. five (5) in the village of Mine au Breton, now Potosi. A lot fronting on High street in said town of Potosi, and being fifty-six feet front by one hundred and fifty feet deep and bounded on the east by lot of Patrick Dallen, on the north and west by lot of R. M. Bugg, and on the south by High street;" that said property was known as the Davidson lot and a house used for a blacksmith and wagon shop stood on it containing tools and material; that all said property belonged to plaintiffs, and as they were desirous of selling it they placed it in the hands of M. E. Rhoades, as their agent, to sell. He negotiated a sale with L. W. Casey for \$3180 for the lot, house, tools and material and immediately afterward a warranty deed to the property was prepared and signed by plaintiffs, but before it could be executed by all the plaintiffs and delivered to the purchaser Casey, the defendant, knowing the facts, maliciously contrived it to be suspected plaintiffs did not own said lot and could

not sell the same, and to prevent plaintiffs from making the sale, "did falsely, maliciously and without probable cause, represent and state of and concerning the plaintiffs and their real estate hereinbefore described, the following: That defendant on the . . . day of March, 1907, in the presence of other persons in the town of Potosi, falsely, maliciously and without probable cause, did go onto said premises of plaintiffs and set up and maintain four stakes thereon, one being at each corner of a piece of ground twenty-six feet wide by sixty-two feet long, and which piece of ground was situate in the northwest corner of the aforesaid premises of plaintiffs, for the purpose of asserting and representing and pretending to the public, to persons likely to purchase said property, and to said L. W. Casey, that defendant was the owner of the ground so staked off, and intending that all persons who saw said stakes on the property of plaintiffs should understand that plaintiff did not have title to the part twenty-six feet wide by sixty-two feet long so marked off and designated by said stakes, and that defendant was the owner thereof, and that the public, persons likely to purchase said property and L. W. Casey saw said stakes so situate and did understand that defendant thereby represented that plaintiff did not have title to a strip of ground twenty-six feet wide by sixty-two feet long as marked off by said stakes in the northwest corner of the premises herein described as belonging to plaintiffs, and that defendant claimed to own the same; that defendant by means of his acts and representations aforesaid, did wrongfully, maliciously and without probable cause represent and assert to the public, to persons likely to purchase said property and to L. W. Casey, that defendant was the owner of a strip of ground twenty-six feet wide by sixty-two feet long in the northwest corner of the premises heretofore described as belonging to plaintiffs, and the plaintiffs had no title

thereto and could not sell the same; when, in truth and in fact, plaintiffs did own said premises and defendant had no interest therein, as he well knew." The petition then goes on to allege "that defendant did, on the . . . days of March, 1907, falsely, maliciously and without probable cause, state and represent of, and concerning the said property of the plaintiff, in the presence of persons in the town of Potosi, the false and slanderous words: 'I (meaning defendant) own a part of the Davidson lot; I (meaning defendant) own a part of that lot (meaning a part of the lot of plaintiffs); I (meaning defendant) have a deed to a part of that lot (meaning the lot of plaintiffs); anybody that buys that lot ( meaning the property of plaintiffs) will buy a lawsuit.'" It is averred defendant intended by those words to charge, and intended those who heard him should understand him to charge, plaintiffs did not have a good title to the premises described, but defendant owned part of said premises by virtue of a deed to a piece twenty-six feet wide by sixty-two feet long in the northwest corner thereof, and that defendant would enforce his claim against said premises by lawsuit against any one who should purchase same from plaintiffs. Various other allegations were made as to the falsity and malice of the words spoken by defendant concerning plaintiff's title and the purpose of defendant in speaking them. The petition concludes thus:

"Plaintiffs say that by reason of said false, defamatory and malicious acts, representations and statements so done and made by defendant, that the said L. W. Casey was dissuaded from the purchase of said property and that when said deed was executed by all of these plaintiffs, and tendered to said L. W. Casey, that he refused to take it and refused to purchase said property for the reasons aforesaid.

"Plaintiffs say that by reason of the aforesaid false and malicious claim of title so made by the defendant,



that they were prevented from selling said property to said L. W. Casey for the sum of \$3180, or to any other person for that sum; and that they were compelled and afterwards did sell said property to Thomas F. Blount, H. E. Blount and W. H. Bust for the sum of \$2500. Wherefore plaintiffs say that by the false and malicious acts and statements of defendant, they have been damaged in the sum of \$680 actual damages, for which they ask judgment, and in the further sum of \$5000 as punitive damages, for which they ask judgment. Plaintiffs pray judgment for \$5680, and for costs of suit."

The jury returned a verdict in favor of plaintiffs for \$680 actual and three thousand dollars punitive damages; but thereafter and before the appeal was taken, remitted the sum of two thousand dollars from the punitive damages; whereupon judgment was entered in favor of plaintiffs for \$1680. Plaintiffs failed to prove the slanderous words laid in the petition, or enough of them to constitute the substance of the charge, and the case was submitted to the jury on the theory that if defendant, in setting up his stakes on the parcel of ground acted falsely, maliciously, without probable cause, and did not have title to the premises claimed by him, or reason to believe he had title, and because of said false representations about the title, Casey refused to purchase the lot, and plaintiffs were compelled to sell it for a less sum, the verdict should be for plaintiffs.

GOODE, J. (after stating the facts).—We would have gone into the facts of the title more fully were we not persuaded no case was made out and the verdict cannot stand. No doubt the action was brought with the expectation of proving not only that defendant drove stakes on the parcel of land in controversy, but claimed to own it by word of mouth and spoke disparagingly of the title of plaintiffs. No spoken or printed words having been proved, plaintiffs insist they are entitled to

have a verdict for defamation of title by the setting out of stakes by defendant. Slander of title differs from slander of person in that it may be the result of written as well as spoken words. [Odgers, Libel and Slander, ch. 4; Newell, Slander (2 Ed.), sec. 2, p. 204.] We have not found a case after long search, nor have we been cited to one, wherein it was held there could be slander of title except by words published in some manner; that is to say, by speaking, writing, printing or other mode of publication. The point never has been decided to our knowledge; but all the authorities imply there must have been a defamation of title by language for the action to lie. Practically conceding the action will not lie as one for slander of title, plaintiffs insist it may be treated as an action in the nature of trespass on the case, the essential fact being that the defendant maliciously asserted title to the ground by driving stakes, when he knew he had no title, for the purpose of preventing plaintiffs from selling, and succeeded in accomplishing the purpose. That is to say, his act alarmed Casey and prevented him from completing the sale, which had been negotiated with him. Without holding such an action will not lie, we hold it was not brought in this instance, which is plainly one for slander of title. The petition does not say setting the stakes out in itself prevented Casey from buying; but alleges, as will be observed by reading the conclusion, that said conduct, in connection with the verbal slander, broke up the sale. The allegation is "that by reason of said false, defamatory and malicious acts, representations and statements so done and made by the defendant," Casey was dissuaded from the purchase of the property, etc. The verbal slander is counted on throughout the petition as an essential part of the cause of action, and there was a futile attempt to make it good by evidence. We hold only that in the present action plaintiffs cannot recover as in trespass on the case, without deciding

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whether or not such a remedy would be available if properly sought.

The judgment will be reversed and cause remanded. All concur.

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STATE ex rel. HENRY P. FLICK, Respondent, v.  
WM. T. REDDISH, etc., et al., Appellants.

Louis Court of Appeals, May 31, 1910.

1. **MANDAMUS: Controlling Courts: Probate Court.** Mandamus lies only to control courts in the performance of ministerial acts, and does not lie to compel a probate court to set aside an order rendered while acting judicially.
2. **EXECUTORS AND ADMINISTRATORS: Refusal to Appoint: Not Appealable Order: Mandamus Proper Remedy.** An order refusing to appoint a person administrator of an estate is not appealable, but the remedy is by mandamus to compel the court to issue letters of administration to him.
3. **——: Who Entitled to be Appointed: Discretion of Probate Court.** The general rule that sections 7, 9, Revised Statutes 1899, prescribing the order in which persons have the right to administer estates, must be observed in granting letters of administration is not so rigid as to preclude the probate court from passing over a person entitled to letters in the statutory order of precedence, where the one passed over is unfit to administer the estate and where to appoint him would subject the assets of the estate to unusual hazard.
4. **——: Revoking Letters: Judicial Act.** Passing on a complaint filed in the probate court to revoke letters testamentary or of administration is a judicial act.
5. **——: Appointment of Administrator: Judicial Act: Probate Court May Exercise Discretion.** Section 42, Revised Statutes 1899, authorizing the probate court to revoke letters testamentary, is *in pari materia* with sections regulating the appointment of administrators, and the several sections should be construed together, and thus construed the probate court, when acting under them, acts judicially and may exercise its discretion in the matter of appointing an administrator; and hence it may decline to appoint a son of an intestate as administrator, where the interests of the estate conflict with the interests of the estate of the son's mother, of which he is administrator.

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6. **MANDAMUS: Executors and Administrators: Refusal to Appoint: Judicial Act.** The finding of a probate court, supported by evidence, that there was a conflict of interests between an estate of which the applicant was already administrator and the estate on which he sought to obtain letters, was judicial in its character, and the refusal of the court to grant letters to such applicant for that reason cannot be altered by mandamus.

Appeal from Scotland Circuit Court.—*Hon. Chas. D. Stewart, Judge.*

REVERSED.

*Smoot & Smoot* for appellants.

(1) The court may pass over a person whose relation to the decedent would otherwise entitle him to preference because of his unsuitableness for the trust. *Cholers Succession*, 39 La. Am. 308, 1 So. 820; *Stearns v. Fiske*, 18 Pick., p. 24; *Fitzgerald v. Smith*, 78 S. W. 1050. Unsuitableness may consist in adverse interest of some kind, or hostility to those immediately interested in the estate whether as creditors or distributees or of an interest adverse to the estate itself. 18 Cyc., p. 94, and authorities cited. (2) Where the interests of two estates are antagonistic same person should not administer both. State to use of *Miller v. Bidlingmaier*, 26 Mo. 283. See also *State ex rel. Muller v. Rheinhardt*, 31 Mo. 95; *Clark v. Crowswhite*, 28 Mo. App. 34.

*O. D. Jones* for respondent.

(1) It is admitted relator made application to administer, he did not relinquish, he was a competent citizen; he was denied his right to administer and a stranger appointed; he attempted to appeal and was denied a trial of his appeal. *Flick v. Schenk*, 212 Mo. 275; *State ex rel. v. Collier*, 92 Mo. App. 38; *State ex rel. v. Fowler*, 108 Mo. 465. (2) In fact it is admitted the same persons are heirs of each estate there really is no conflict

of interest. All the settlement he could or would make, under the supervision of the court would be, between the two estates to determine how much money would be in each estate for distribution. There was no claim here of one estate to be presented against the other as in *State v. Bidlingmaier*, 26 Mo. 483, and in *State v. Reinhardt*, 31 Mo. 95. (3) The probate court had no discretion in the matter and could not exercise any judicial discretion to involve anything from which an appeal would lie. *State ex rel. v. Guinotte*, 113 Mo. App. 399.

GOODE, J.—Mandamus proceeding from the circuit court of Scotland county against William F. Reddish, judge of the probate court of said county, and J. A. Schenk, public administrator of the county, in charge of the estate of Sylvanus Flick, deceased. The prayer of the petition and of the alternative writ, is that a peremptory writ issue to Judge Reddish, commanding him to revoke an order of the probate court entered September 21, 1903, directing the public administrator to take charge of the estate of said Flick, to remove Schenk as administrator of the estate and to appoint relator, Henry P. Flick, administrator *de bonis non*. Sylvanus Flick died in 1902, leaving a personal estate of around \$12,000, of which eight children and, as we understand, some grandchildren, were heirs. Sarah D. Flick was appointed administratrix, took charge of the estate and entered on its administration, but died a year later without having made final settlement. Relator Henry P. Flick was thereupon appointed administrator of his mother's estate and also guardian and curator of minor children of a deceased sister. He subsequently applied to be appointed administrator *de bonis non* of his father's estate, but met with the opposition of three of his sisters, who were heirs. Evidence was taken on the application by the probate court and findings made that relator had borrowed money from the estate of his deceased father without an order of the court authorizing

the loan; that there was a conflict of interest between the estates of relator's father and mother, and also a conflict of interest between relator Henry P. Flick and the estate of Sylvanus Flick; that considering the condition and amount of the estate of said Sylvanus Flick, relator was not a proper person to act as administrator thereof, but was wholly incompetent for the purpose; wherefore the probate court denied the application of relator to be appointed administrator *de bonis non* of his father's estate. The judgment on the application next recited there was no relative of Sylvanus Flick, deceased, or distributee of his estate, competent to administer the estate, and as it appeared money, property and papers belonging to it were left in a situation exposed to loss and damage, and the estate was liable to be injured and wasted, J. A. Schenk, public administrator, was ordered to take it in charge and complete the administration. That order was entered September 21, 1903, and during the September term of the probate court. An appeal was taken from it to the circuit court of Scotland county, where the same result was reached. From thence an appeal was taken to this court; but we dismissed the appeal because the original appeal from the probate court to the circuit court would not lie, hence the latter court had acquired no jurisdiction of the proceeding, and this court could acquire none of the appeal from the circuit court. [In *re Flick's Estate*, 136 Mo. App. 164.] We certified the case to the Supreme Court, deeming our decision in conflict with the decision of the Kansas City Court of Appeals in *Burge v. Burge*, 94 Mo. App. 15. The Supreme Court decided the case as we had, dismissing the appeal on the ground the original appeal taken from the judgment of the probate court refusing to appoint relator administrator, would not lie, and holding mandamus was the remedy for refusal to appoint a person administrator of an estate who was entitled by statute to be appointed. Thereafter the present proceeding was instituted, and in the peti-

tion the facts were stated much as we have stated them, except the charge is made that the orders of the probate court in appointing relator administrator of his mother's estate, refusing to appoint him administrator *de bonis non* of his father's estate, and appointing the public administrator, were corrupt; a charge, we will say in passing, of which there is no proof in the record. The present petition says most of the heirs of Sylvanus Flick, deceased, requested the appointment of the relator, but two or three protested against the appointment. Various other statements and charges are made in the petition for the writ of mandamus which are immaterial and will not be recited. The substance of the return to the writ consists of a recital *in haec verba* of the order of the probate court refusing to appoint relator and appointing Schenk; averments, that, after Schenk had been appointed, he took charge of the estate, and is administering it; that relator is wholly incapable of managing the estate because he is not capable of understanding the nature of the business and does not have mind or memory sufficient to be administrator; that he is in debt to the estate; that Sylvanus Flick had paid large security debts for him at different times which the heirs desire to collect from relator; that relator had been appointed administrator and had taken charge of his mother's estate, and, as such administrator, had undertaken to claim the whole estate of Sylvanus Flick as belonging to her and still claims the money and property, which had been in her hands as administratrix of the estate of Sylvanus Flick, belonged to her in person; that relator had borrowed money of the estate of Sylvanus Flick while his mother was administratrix, had never returned it and was attempting to conceal it; that there are conflicting interests between the estates of his father and mother; that controversies will have to be settled and adjudicated between the two estates; further, the determination of the probate court, when relator's application for letters was refused, was an ad-

judication of his right to administer. The reply to the return denied the probate court had jurisdiction of the parties and of the heirs of Sylvanus Flick's estate so it might determine the competency of relator to take charge as administrator of said estate, at the time it denied his application; avers said court had no authority to pass on relator's competency, unless it was to find he was insane or of unsound mind; denied there was a conflict of interest between the estates of Sylvanus Flick and Sarah D. Flick, because the heirs of each estate were and now are the same persons, and their interests are the same, and both estates should have been settled together; alleged when it appeared relator was of legal age, a resident of the State of Missouri, and of sound mind, it became the absolute duty of the probate court to appoint him administrator of his father's estate and said court had no discretion in the matter; that those facts regarding relator were conceded and, therefore, he was entitled to be appointed. At the hearing of this proceeding in the circuit court, considerable evidence was introduced, which, as far as pertinent to the appeal, we may epitomize as follows: It was in proof relator borrowed \$750 from his mother as administratrix while she was in charge of his father's estate, giving no security except his own note; this loan was not authorized by the probate court. It was in testimony, too, that Sylvanus Flick had paid a security debt for relator; that relator had declared on divers occasions two of his sisters, naming them, should never have a cent from his father's estate, and he would spend every cent he could raise to prevent them from receiving a portion of said estate; that he had been appointed and was in charge of his mother's estate, administering the same, had been appointed guardian and curator of several nephews and nieces; that his mother died without making final settlement as administratrix of her husband's estate. The circuit court made the alternative writ of mandamus peremptory, commanded defendant Reddish



to make and immediately enter an order removing J. A. Schenk as administrator of the estate of Sylvanus Flick and to appoint Henry P. Flick administrator of said estate; further, commanded defendant Schenk within ten days to make out a complete settlement of his accounts as administrator of the estate, file it in the probate court and turn over to relator all money, notes, books, accounts, credits and papers belonging or appertaining to said estate in his hands as administrator. From said judgment an appeal was taken to this court.

The question for decision is whether or not the probate court acted judicially in passing on the application of relator to be appointed administrator; for, if it did, it cannot be compelled by mandamus to set aside its order and enter one of the opposite effect. Such a function does not belong to the writ of mandamus, which only controls courts in the performance of ministerial acts. [State ex rel. v. Allen, 92 Mo. App. 20.] This question is rendered embarrassing by the condition of the law in this State, particularly by the fact that no appeal lies from the refusal of the probate court to grant letters of administration to an applicant; whereas in many states, the right of appeal is accorded to the applicant. [In re Banquier, 88 Cal. 478; In re Est. Patcheco, 23 Cal. 470; Lawrence v. Englesby, 24 Vt. 42; Bowersox's Appeal, 100 Pa. St. 434; Stevenson v. Fiske, 18 Pick. 24; Fitzgerald v. Smith, 112 Tenn. 176, 78 S. W. 1050.] Because of the omission of the Legislature to provide for an appeal from such an order, the courts of this State have been compelled to hold no appeal will lie. [State ex rel. v. Fowler, 108 Mo. 465, 18 S. W. 968; In re Estate of Flick, 212 Mo. 275, 100 S. W. 1074, s. c. 136 Mo. App. 164, 117 S. W. 93.] In those cases, and others where the question arose, it was declared the remedy of a person entitled by virtue of the statutes to letters of administration was the writ of

mandamus issued to the probate court and commanding it to issue letters to him; and in the same cases it was said the probate court had no discretion about following the statutory provisions regulating priorities of right to administer. [Cases supra; State ex rel. v. Guinotte, 113 Mo. App. 399, 86 S. W. 884.] This statement of the law by the appellate tribunals of the state, is invoked by relator in the present proceeding as authority for the proposition that the probate court was bound to grant letters to him on the estate of his father—its duty in this regard being ministerial and in passing on his application it performed no judicial act; therefore was subject to control to make it accord him his statutory right to letters. Especially is the case of State ex rel. v. Guinotte relied on for this doctrine. It is not our opinion that the Supreme Court and the Courts of Appeals, when they have said mandamus was the appropriate remedy to compel the grant of letters to a party entitled under the statute, and the probate court had no discretion about granting the letters to a person so entitled, meant that under no circumstances would said court have discretion in the matter, but would act always ministerially instead of judicially. The choice of an administrator of an estate may become a judicial duty of grave importance, because the preservation of the estate and its transmission to the heirs and distributees without loss or undue delay, will depend largely on who is chosen. Nevertheless it is the policy of our statutes, and has been the policy of the law for ages, to entrust the administration of estates to persons who ultimately will take as distributees and, therefore, presumably will feel every incentive to administer economically and carefully. In carrying out this policy, legislation in this State, and in many other states, has disqualified certain individuals from administering; such as judges, clerks of probate, persons under the age of twenty-one years, those of unsound mind, married women, and non-residents. [R. S. 1899,

sec. 6 *et seq.*] The order in which persons have the right to administer is prescribed by providing letters shall be granted, first to the husband or wife of the deceased; second, to those who are entitled to distribution of the estate, or one or more of them, as the court, in its discretion, deems will promote best the preservation of it. [R. S. 1899, sec. 7.] If the enumerated persons fail to apply in a given time for letters, or are non-residents, the probate court is empowered to grant letters to some other person who is deemed suitable. [R. S. 1899, sec. 9.] As stated, it has been decided the statutory regulations must be observed in granting letters, and this is general law. [11 Ency. Law (2 Ed.), 767; 18 Cyc. 83; Schuler, Exrs. and Admsrs. (3 Ed.), ch. 3.] The rule is not so rigid as to preclude a court from passing over a person who would be entitled to letters in the statutory order of precedence, in order to grant letters to some one else, if the former is unfit to administer the estate and to appoint him would subject the assets to unusual hazards. [11 Ency. Law, 767, 18 Cyc. 84; Spencer's Estate, 7 Pa. Dist. Rep. 216; Stevenson v. Fiske, *supra*; Fitzgerald v. Smith, 112 Tenn. 176; Lawrence v. Englesby, 24 Vt. 42; Swarts Est. 189 Pa. St. 71.] That it may be a judicial question whether the one *prima facie* entitled shall be appointed, is a proposition deducible from our administration statutes. These say if an executor becomes of unsound mind, or is convicted of a felony or other crime, or becomes an habitual drunkard, or in anywise incapable or unsuitable to execute the trust reposed in him, etc., the probate court, on complaint in writing made by any person interested and supported by affidavit, shall hear the complaint, and if it finds just cause, shall revoke the letters granted. [R. S. 1899, sec. 42.] Plainly, passing on a complaint filed to revoke letters is a judicial act. [Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113.] The statute just cited is *in pari materia* with sections regulating the appointment of administrators, and the several sections should be construed to-

gether. Thus construed it looks improbable that the Legislature meant to say the court should act judicially in regard to revoking the letters when it believed the person to whom they had been issued had become unfit for the office, but to deny the court any discretion in appointing an applicant if it appeared he was unfit for the position. Moreover, it has been determined by the Supreme Court that, where the interests of two estates conflict, the same person cannot act as administrator of both. [State to use v. Bidlingmaier, 26 Mo. 483, Id., 31 Mo. 95; Clark v. Crosswhite, 28 Mo. App. 34.] That being true, it would be improper in such a contingency to appoint one person administrator for both estates; and in determining whether the interests of the two estates conflict, the court would act judicially. That is the exact situation presented. Relator had been appointed administrator of his mother's estate, had accepted the appointment and entered on the discharge of his duties as administrator. The court below assigned as one reason for declining to appoint him administrator of his father's estate, that the interests of the two estates conflicted. As there is evidence tending to prove they did, this case falls within the decisions of the Supreme Court, *supra*, and the finding of the court below being judicial in its character, cannot be altered by mandamus. In *State ex rel. v. Guinotte* and *State ex rel. v. Reynolds*, 121 Mo. App. 699, 97 S. W. 650, so much relied on by relator, the court strove in its opinions to show no objection had been made to the appointment of the respective relators as administrator in one case and curator in the other, which had to be passed on judicially. That is to say, in those cases it was held the probate court had not been called on to exercise any discretion, but only to perform a ministerial act. The facts here are essentially different; wherefore the judgment will be reversed. All concur.

LOUIS R. REIFSCHNEIDER, Respondent, v. H. W.  
BECK, Appellant.

St. Louis Court of Appeals. Argued and Submitted April 7, 1910.  
Opinion Filed May 31, 1910.

1. **REFERENCE: Involved Accounts.** A suit for work and material in erecting buildings was properly referred, with or without consent of the parties, where it involved the examination of a very long account with which it would have been difficult for a jury to deal intelligently.
2. **APPELLATE PRACTICE: Review of Referee's Finding.** An appellate court may, on motion of either party, review a referee's findings, and affirm or reverse the judgment in whole or in part.
3. ———: **Conclusiveness of Finding on Conflicting Evidence.** A finding by a referee selected by the parties will not be disturbed on appeal, where it is based on conflicting evidence and has been affirmed by the trial court.
4. **CONTRACTS: Suit May be Brought on Quantum Meruit, Although Express Contract Exists: Measure of Recovery.** One who has furnished work and labor under a contract fixing the price may abandon the contract and sue on a *quantum meruit* or *quantum valebat*, but the measure of recovery would be the amount stated in the contract.
5. ———: **Action on Contract: Pleading: Recovery Confined to Theory Pleaded.** One suing on a special contract must recover on it or not at all, and, conversely, where one sues on a *quantum meruit* or *quantum valebat* he cannot recover on a special contract.
6. ———: ———: ———: ———: **Amendment: Conforming Petition to Evidence.** Under the Statute of Jeofails (section 657, Revised Statutes 1899) authorizing the amendment of pleadings, etc., before judgment, in furtherance of justice, it was not prejudicial error to allow one who sued on a joint contract to dismiss as to one of the two defendants and amend so as to show single liability of the other, after the referee's report, to conform to the evidence, where the answers pleaded that one of the defendants acted as agent for the other.
7. ———: ———: **Assumpsit: Joint Liability.** In an action for labor performed and material furnished, under allegations in the petition that the labor was performed and the materials were furnished at the instance and request and for the use and benefit of two defendants, the action may be one of joint assumpsit.

8. **PARTIES: Misjoinder: When to be Raised by Answer.** A misjoinder not apparent on the face of the petition can be taken advantage of by answer only.
9. ———: ———: **Waiver.** Under section 602, Revised Statutes 1899, misjoinder of parties is waived unless raised by demurrer or answer.
10. **JURISDICTION: Over Person: Lack of, Waived by Appearance.** Where the suit as to the defendant served in the county was dismissed, the remaining defendant who was served outside the county waived the right to question jurisdiction over him by subsequently appearing, pleading, and participating in the trial on the merits.

Appeal from St. Louis County Circuit Court.—*Hon. John W. McElhinney, Judge.*

**AFFIRMED.**

*George F. Beck* for appellant.

(1) Where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof. R. S. 1899, sec. 798. (2) A cause alleged to be based on a joint and several contract cannot be sustained by proof of a cause founded on the separate contract of one of the alleged joint promisors notwithstanding the provisions of section 892, R. S. 1899. *Myers v. Railroad*, 120 Mo. App. 288; *Timber Co. v. Railroad*, 180 Mo. 420; *Davis & Rankin v. Creamery Assn.*, 63 Mo. App. 477; *Bank v. Campbell*, 34 Mo. App. 45; *Hempstead v. Stone*, 2 Mo. 65; *Erwin v. Devine*, 24 Ky. (J. J. Marsh), 204; *Gamble v. Kellum*, 97 Ala. 677; *Black v. Struthers*, 11 Iowa 459; *Murray v. Davis*, 6 Jones (N. C.) 341; *Thompson v. Tenn.*, 100 Ga. 234; *Rohr v. Davis*, 9 Leigh (Va.) 30. (3) An amendment which changes the cause of action upon a joint contract, to a cause of action upon a several contract, constitutes an entire change in the cause

of action, which is not permissible. *Slaughter v. Davenport*, 151 Mo. 26; *Pattison's Code Pleading*, sec. 974; 1 Am. and Eng. Ency. of Pl. & Pr., p. 586; *Heman v. Glann*, 129 Mo. 325; *Lumkin v. Collier*, 69 Mo. 170. (4) The finding of the referee that plaintiff contracted to erect a barn for defendant and furnish the material therefor is inconsistent with plaintiff's cause of action based on a sale and delivery of material, and destroys the claim on which his suit is brought. *King v. Campbell*, 107 Mo. App. 496; *King v. Brockschmidt*, 3 Mo. App. 571. (5) Where an action involves the examination of a long account, the court may order a trial before a referee without the consent of the parties. *Roth v. Wire Co.*, 94 Mo. App. 236; *Bank v. Owen*, 101 Mo. 558; *Tobacco Co. v. Walker*, 123 Mo. 662; *Raines v. Lumpee*, 80 Mo. App. 203. (6) Where the case is one for compulsory reference, although the case has by agreement been submitted to a referee, the trial court may on motion of either party review the findings of the referee and the appellate court may review the findings and affirm or reverse the judgment of the circuit court in whole or in part. *Williams v. Railroad*, 153 Mo. 487; *Roth v. Wire Co.*, 94 Mo. App. 236; *Caldwell v. Wright*, 88 Mo. App. 604; *Ely v. Ownby*, 59 Mo. 437; *Cahill v. McCornish*, 74 Mo. App. 609; *Raines v. Lumpee*, 80 Mo. App. 203; *Bernard v. Mott*, 89 Mo. App. 403; *Tobacco Co. v. Walker*, 123 Mo. 662; *Utley v. Hill*, 155 Mo. 232; *Lack v. Brecht*, 166 Mo. 242; *Bond v. Finley*, 74 Mo. App. 22; *Raines v. Lumpee*, 80 Mo. App. 203; *Barnard v. Mott*, 89 Mo. App. 403; *West v. Bank*, 110 Mo. App. 490. (7) Where parties agreed orally upon the terms of a contract and with the understanding that it should afterwards be put in writing, the contract was an oral one and became effective from the time of the agreement, and the writing was unnecessary to make it effective. *Hudson v. Rodgers*, 121 Mo. App. 168; *Riggins v. Railroad*, 73 Mo. 598; *Green v. Cole*, 103 Mo. 70. (8) If rescission be relied upon as a de-

fense to a contract, it must be specially pleaded. Proof of the fact will not be admitted under a pleading which only denies the making of the contract and avers a breach of it. *Riggins v. Railroad*, 73 Mo. 598. (9) In a suit upon a *quantum meruit*, if a specific contract is developed on the trial, it will control and limit the amount of the recovery, and that recovery is for the value of the services rendered, not to exceed the contract price. *Heman v. Improvement Co.*, 58 Mo. App. 480; *Linnenkohl v. Winkelmeyer*, 54 Mo. App. 570; *Williams v. Railroad*, 112 Mo. 463; *Yeats v. Ballentine*, 56 Mo. 530. (10) The law implies that all work is to be done in a workmanlike manner, although the contract is silent upon the point. Even the fact that the price agreed upon was grossly inadequate or that the defendant saw the work done and had benefited thereby will not modify this rule. *Lloyd on Building Contracts*, sec. 29. (11) The owner of a house is not bound to leave it vacant, after the builder has done his work, merely because he claims that the work was insufficiently done. If he takes possession, he is not therefore precluded from any differences arising from the insufficient character of the work, that he may have to a suit by the builder for his pay. *Eberly v. Curtis*, 5 Mo. App. 595; *Boteler v. Roy*, 40 Mo. App. 234; *Light & Heat Co. v. Daud*, 47 Mo. App. 439; *Lloyd, Building Contracts*, sec. 29; *Mohney v. Reed*, 40 Mo. App. 99.

*D. C. Taylor and J. C. Kiskaddon* for respondent.

(1) Neither the dismissal as to one of the defendants, or the filing of an amended petition, changed the cause of action. Where substantially the same evidence is required to support the two petitions, and the same judgment may be rendered, there is no change in the cause of action. *Grigsby v. Barton Co.*, 169 Mo. 221; *Harrison v. Murphy*, 106 Mo. App. 465; *Goldsmith v. Holland*, 182 Mo. App. 597; *Stewart v. Van*



Horn, 91 Mo. App. 647; Hall v. Railroad, 80 Mo. App. 463; Pence v. Gabbert, 70 Mo. App. 201; Howard v. Shirley, 75 Mo. App. 150. (2) When it was discovered on the trial of the case that Chas. J. Beck was only the agent of the defendant H. W. Beck, and the court allowed plaintiff to dismiss as to Chas. J. Beck, and when, after hearing the whole case without objection being made to the petition, the court permitted the petition to be amended by inserting an allegation material to the case, there was done what the following statute expressly authorizes: "The court may at any time before final judgment in furtherance of justice, . . . amend any . . . pleading, . . . by striking out the name of any party, . . . or by inserting other allegations material to the case, when the amendment does not change substantially the claim . . . by conforming the pleading . . . to the facts proved." R. S., sec. 657; Goodman v. Kahoka, 100 Mo. App. 278; Goldsmith v. Holland, 182 Mo. 597; Howard v. Shirley, 75 Mo. App. 150; Cagle v. Ins. Co., 78 Mo. App. 431. (3) The petition in an action against an agent and his principal is only defective as to parties, and when, during the course of the trial, plaintiff dismisses as to the agent, there is still left in the petition a cause of action against the principal. Rider v. Kirk, 82 Mo. App. 120. (4) Where an agent and principal are jointly sued, and the principal is a non-resident of the county in which the suit is brought, and during the trial the action is dismissed as to the agent, the court still has jurisdiction of the non-resident principal, he having answered without specially setting up his non-residence as a defense. Rider v. Kirk, 82 Mo. App. 120; Meyer v. Broadwell, 83 Mo. 571; Pry v. Railroad, 73 Mo. 123; Peters v. Railroad, 59 Mo. 406; Orear v. Clough, 52 Mo. 55; Griffin v. Vanmeter, 53 Mo. 430.

**STATEMENT.**—The plaintiff commenced this action in the circuit court of St. Louis county, stating in his

petition that H. W. Beck and Chas. J. Beck, who were named as defendants, are justly indebted to him in the sum of \$1112.78, for lumber, etc., sold and delivered to defendants upon their farm in St. Louis county, at defendants' instance and request, and for their use and benefit, and for work and labor furnished defendants for their use and benefit and at their request upon certain buildings erected by defendants upon their said farm. Judgment was asked for that amount and for costs. Attached to the petition was a long account embracing over fifty items.

The defendants answered by a general denial. Thereupon the cause was referred, by consent of the parties, Wm. F. Broadhead, Esq., being appointed to hear and determine all the issues therein involved, who thereafter duly qualified as such referee by taking the oath as required by law. After the reference defendants, by leave of court, filed an amended answer to the plaintiff's petition, which it is not necessary to set out further than to say that after a general denial, it set up that Chas. J. Beck, as agent for the defendant H. W. Beck, had entered into a certain oral contract or agreement with plaintiff whereby the plaintiff agreed to build for H. W. Beck a certain frame barn on the farm of defendant H. W. Beck, the agreement setting out what plaintiff was to furnish and what the defendant H. W. Beck was to furnish, and that the plaintiff should receive for the materials and work and labor on the barn the price and sum of \$737. It then goes on to specify matters and items in which the plaintiff had failed to comply with the contract or had furnished defective material and which defendant H. W. Beck had been obliged to furnish to complete the barn, the total amounting to \$405.50, and the answer concludes that by reason of the premises "these defendants say that defendants have been damaged in the sum of four hundred and five dollars and fifty cents (\$405.50), and a cause of action therefor has accrued to him (sic) against said plaintiff, and for

which amount and costs, said defendants pray judgment against said plaintiff."

A reply, which was a general denial, was filed to this.

After the evidence had been submitted before the referee, the defendants, by consent on July 7th, filed a second amended answer, which was also a general denial and a repetition of the contract between plaintiff and defendant H. W. Beck, made through Chas. J. Beck, and the failure of the plaintiff to comply with the alleged contract; and for a second defense H. W. Beck set up the failure of plaintiff to do certain work and furnish certain material, etc., as before set out and claimed that H. W. Beck is damaged in the amount of \$550, for which amount he asks judgment. The defendant Chas. J. Beck for a separate counterclaim, sets out that plaintiff owed him for meals furnished to hands in his employ in the amount of sixteen dollars, for which he asks judgment. There was a general denial as reply to this answer, and afterwards and before the referee filed his report, the plaintiff dismissed as to defendant Chas. J. Beck. At the conclusion of the hearing, the referee filed a report which he withdrew by leave of court, and afterwards filed an amended report, accompanied by a transcript of the evidence taken before him. In and by this report the referee allowed plaintiff \$1111.78 less \$14.30 allowed defendant on account of meals, finding a total due plaintiff of \$1097.48. He further allowed defendant, on his counterclaim \$95.90, disallowing the other items claimed by the defendant, in this way arriving at the amount in favor of plaintiff as \$1001.58. He finds and reports that on the 20th of October, 1904, the plaintiff orally contracted and agreed with the defendant Henry W. Beck, through Chas. J. Beck, as his agent, to build for the defendant the frame barn mentioned in the pleadings, describing it, and "that many but not all of the details of plan, construction,

dimension and material were determined and agreed upon between them, in part orally and in part as shown by memorandum in writing and imperfect sketches, but that no specific detailed or accurate or entire plans, drawings, or specifications were drawn up for use in the construction of said barn, nor was any specific price agreed upon for building said barn, for the labor thereon, nor for the materials to be used, except for the cement to be used in the foundation; that some of the plans, as agreed upon, were changed by defendant during the progress of the work," etc., setting out generally what the agreement was as to the details of the work and its quality. He then finds that the building of the barn was commenced on the 20th of November, 1904, and the main part completed about a month thereafter; that plaintiff sold and furnished defendant the material as mentioned and charged in the account; that the materials were used for and entered into the construction of the barn and in the main were good, sufficient and suitable for the purpose and that the price charged for such material in said accounts was its reasonable value; that plaintiff furnished defendant the labor employed in the construction of the barn and the charges therefor are reasonable when reduced by the price of meals furnished by defendant to the men, as the referee had done in stating the account, and that the work done on the barn was in the main good and suitable for the structure, with the exception if the particulars for which credits were allowed defendant in his counterclaim. He then sets out the allowance on the counterclaim as above.

The defendants filed, separately, exceptions to the report, hearings on which were continued by the court from term to term until the May term, 1908. At that term and on the 29th of June, 1908, and pending a finding on the exceptions to the report, plaintiff having previously dismissed as to Chas. J. Beck, by leave of court filed his amended petition against H. W. Beck

alone, stating in this that it was filed by leave of court after the hearing of the cause before the referee and after the report of the referee and while the question of the approval of the report was pending before the court "for the purpose of supplying a defect in the petition and to make said petition conform to the facts proved." This amended petition then states that defendant, H. W. Beck, is indebted to plaintiff in the sum of \$1112.78 for lumber, cement, etc., and for labor done at the request of defendant upon certain buildings being erected on the defendant's farm, the particulars of it being set out in the exhibit "A," before filed with the original petition; that each and all of the several charges are of the reasonable value of the items; that payments had been demanded and judgment is asked for the amount as before. The record states that thereupon and at the same time the court granted defendant leave to refile his second amended answer to the amended petition, and treated it as refiled, that being the answer filed July 7th, and granted leave and considered the reply of plaintiff to that as refiled, and at the same time the court overruled the exceptions of H. W. Beck to the referee's report and entered judgment in favor of plaintiff and against defendant for \$1001.58 and costs. Defendant H. W. Beck in due time filed his motion for new trial which was overruled and exceptions saved and an appeal duly perfected to this court by him.

REYNOLDS, P. J. (after stating the facts).—While we have been favored in this case by an exceedingly elaborate and carefully prepared brief and argument on the part of the learned counsel for the appellant, the case is really within a very narrow compass. Whether the reference in this case was made in accordance with section 697, Revised Statutes 1899, by consent of the parties, is not clear. While there is no evidence of a written consent, it does appear that the parties appeared and agreed upon a referee and the

cause was thereupon referred to the person so agreed upon, under section 699, R. S. 1899, "to hear and determine all the issues involved therein." It was distinctly a case for a reference. It involved the examination of a very long account, which the court could have referred without consent. The testimony shows that it was of such a nature that it would have been almost impossible for a jury to have dealt with it intelligently. Therefore it falls within what appears to be the rule in such a case, that the appellate court may, on motion of either party, review the findings of the referee and affirm or reverse the judgment in whole or in part. [State v. Hurlstone, 92 Mo. 327, 5 S. W. 38; Williams v. Railroad, 153 Mo. 487, 1. c. 485, 54 S. W. 689; Lack v. Brecht, 166 Mo. 242, 1. c. 257, 65 S. W. 976.]

The errors assigned by the learned counsel, both by exception and by motion for new trial, save what is claimed to be an error of law to be hereafter referred to, are to errors of the referee in his finding on facts. No errors are here assigned on the admission or rejection of evidence. Included in the finding of the referee is a very important and material one, that there was no contract covering the whole construction, and no contract whatever between plaintiff and defendant Henry W. Beck or Chas. J. Beck as his agent, as to the price to be charged for the material furnished and work and labor performed. If that finding is supported by the testimony, and it being against the existence of a contract for the price, it strikes at the very foundation of one of the claims of plaintiff, namely, the claim of error as to a limited contract price.

We have read all of the evidence in the case. Reading that evidence, we find it flatly and irreconcilably contradictory on all matters in controversy. If we are to weigh it we are confronted with a situation in which we are at a great disadvantage. We did not have the witnesses before us. The referee had. He was selected by the parties. His report has been confirmed by a very

careful trial judge. Under these circumstances we do not feel warranted in disturbing that finding.

Defendant insists that the action is on a joint contract, a contract entered into by plaintiff with H. W. Beck and C. J. Beck jointly. The action as set out in the original petition is not on an express contract but on *quantum meruit* for the services and *quantum valebat* for the material furnished. It is an action in assumpsit, as it would be called if we preserved the common law forms of actions. Distinctively it is not an action upon an express contract. Whether this contract as set out in the original petition was a joint or several contract is not stated in that petition. Nor do we hold that it was necessary to use the word "joint," in declaring on a contract, whether express or implied. We will return to this question, as affecting plaintiff's right to dismiss as to one of the defendants, later. Assuming that an express contract had been proven which covered not only the details of the work and labor to be done and performed and material to be furnished, but also the price to be paid for these, plaintiff had a clear right to abandon this contract and sue in assumpsit, and if an express contract had been proven, notwithstanding the suit was not on it but on a *quantum meruit* or *quantum valebat*, the measure of the recovery by plaintiff would be the amount stated in the contract. The rule applicable to cases of that kind is well and accurately stated by Judge NORTON, speaking for this court, in the case of *Cozad v. Elam*, 115 Mo. App. 136, 91 S. W. 434. Furthermore, it is the settled law of this State that where a party sues on a special contract he must recover upon that or not recover at all in that action; that having elected to stand upon a special contract he cannot recover for money had and received to his use or upon a *quantum meruit* for work and labor done or services rendered. [*Cole v. Armour*, 154 Mo. 333, 1. c. 350, 55 S. W. 476.] This is settled by an unbroken line of authority. The converse of this proposition is,

that where a party sues on a *quantum meruit* or *quantum valebat*, he cannot recover on a special contract if one is proven. As held in *Cozad v. Elam*, supra, while he cannot, having sued on an implied contract, recover on the express contract, on a contract being proven he cannot recover by way of damages more than the amount stipulated in the contract. In the case at bar, applying these principles, it is found as a fact by the referee that while there was a contract between plaintiff and Chas. J. Beck, as agent of H. W. Beck, as to many of the items and details of the work, it did not cover the whole work and it did not fix or limit any price; he specifically finds that it did not limit or fix a price. Hence all the assignments of error to the allowance of more than the amount that the defendant claimed had been agreed upon by contract must fail, the referee having found that there was no contract limiting or fixing the price.

We find no error in the rulings of the referee on the exclusion or admission of testimony. There is substantial evidence to support all of his findings and we are therefore without good cause to disturb his finding or the action of the circuit court in overruling exceptions to the report, unless there be some merit in the contention, which is so earnestly made and elaborately and learnedly argued by the counsel for the defendant, that plaintiff having sued both defendants, cannot afterwards dismiss as to one and recover as against the other, and hence that it was error to have allowed plaintiff to amend his petition on June 29, 1908, so as to sue in implied assumpsit against H. W. Beck alone, instead of H. W. and C. J. Beck, who were the original defendants. H. W. Beck excepted to this amendment, which was made after the evidence had been taken and the report of the referee filed, in order to conform the petition to the evidence. The two defendants originally sued had stated in their answers that C. J. Beck was but the agent of H. W. Beck, and H. W. Beck was the man who



really contracted with plaintiff to build the barn. Many cases are cited on the point that a party cannot sue on a joint contract and recover on a several one; that proof of a several contract will not sustain a petition declaring on a joint one. We have been cited to no case, however, which holds that if a plaintiff declares on a joint contract against two or more defendants and the proof shows a several contract, it is error to permit him to amend his petition to conform to the facts. That this amounts to a total change of a cause of action is contended by defendant's counsel, citing *Slaughter v. Davenport*, 151 Mo. 26, 51 S. W. 471; *Pattison's Code Pleading*, sec. 974; *Am. and Eng. Ency. Pl. and Pr.*, vol. 1, p. 586.

We find nothing to support this or on this proposition in *Am. and Eng. Ency. Pl. and Pr.*, in vol. 1, p. 586, and have not been able to find anything in *Pattison's Code Pleadings*, except a reference to *Slaughter v. Davenport*. What that case decided was that where there had been a promise to pay three persons jointly, one of them could not maintain an action on the promise but the action must be in the name of the three promisees. Regarding the *Slaughter* case it is to be observed that it was begun in a justice's court in the name of the three promisees and after appeal to the circuit court, the statement was amended by striking out the names of two promisees, leaving the action in the name of one only. The Supreme Court held it rightly brought in the first place and the amendment bad. A joint promise to two cannot be sued on by one, for the judgment would not be a good defense against an action by the other promisee. But what the court was considering in the *Slaughter* case was the statute regarding amendments of appeals from justices of the peace; and what was decided was that the amendment was a change of the cause of action within the sense of that statute; in other words the case stated by the amendment was not

the same cause of action originally instituted before the justice. We do not consider that case an authority for the proposition that an amendment of the petition cannot be allowed, if the petition was originally against two persons as obligors so as to make it against one only, the evidence showing that but one had obligated himself. Moreover, in the present case the defendants themselves had been pleading that very fact and certainly it was not prejudicial error to make the petition conform to what they had averred all along was the fact, inasmuch as they could not be misled by such an amendment.

It is true the petition does not allege a joint assumpsit, but it does allege the labor and materials were furnished at the instance and request of the defendants; that is, both of them, and for their use and benefit. That this may be a joint assumpsit is shown in the cases reviewed by appellant's counsel in the motion for rehearing.

In *Crews v. Lackland*, 67 Mo. 619, Judge SHERWOOD, commenting on an instruction which set out that the defendants were sued as partners and that the burthen of proof on this point is upon the plaintiff and that unless the jury are satisfied from the evidence in the case that at the time of the alleged making of the alleged contract, the defendants were partners, then the verdict must be for the defendants, said that at common law it is clear that this instruction should have been given but that our statute, referring to what is now section 624, Revised Statutes 1899, had altered the rule of the common law and that the section is applicable to suits against partners as well as to suits in which there were more than one defendant.

"It is difficult to see," in this case, as was said by our Supreme Court in the *Slaughter* case, and as was done in *Rider v. Kirk*, 82 Mo. App. 120, the case having been dismissed as against Chas. J. Beck before final submission and before the report of the referee

and before confirmation of that report, "how the dismissal of it as to him could in any way change the cause of action."

It appears very clearly by the evidence in the case, that Chas. J. Beck was the party with whom all the transactions connected with the building of this barn were had. It is probably true that plaintiff knew that the barn was to be erected on a farm owned by Henry W. Beck. It is true that what is claimed to have been the bid or proposal of plaintiff for doing the work is in the name of H. W. Beck. Notwithstanding this, there was nothing to indicate that Chas. J. Beck, who was living upon the farm alone—that is Henry W. Beck does not appear to have lived there—might not have been erecting the barn for his own use and was to pay for it. It might have been, from anything that appears in the testimony, that Chas. J. Beck was the agent of an undisclosed principal, or it might have been that he was acting for himself or with his father in the erection of a barn on his father's farm. The evidence tends to convey the impression that this barn was to be used for the sheltering of stock which that same evidence seems to indicate it was being raised by Chas. J. Beck, and was his own property. The bargaining was with Charles alone, and the father does not, save in name, appear in the transaction at all. He does not appear to have been on the premises or looked after the construction even when his son was laid up with a broken limb and unable to leave the house. Under these circumstances it would be a harsh rule to say that because plaintiff proceeded against both the principal and the agent, that when he discovered that the facts set out in the answer and as developed at the trial were that Chas. J. Beck was the mere agent of his father, Henry W. Beck, in the erection of this barn, and that fact was discovered before final judgment in the case, that the plaintiff should not be allowed to dismiss as to the agent and go out of court when conforming to the proof in the case, he dismissed

as to the agent. Surely it would be a refinement of technicality and not in furtherance or promotion of substantial justice, or to the making an end of litigation, to require this. More especially so, when the interests of no one were affected, the rights of no one disturbed or even jeopardized, no one surprised or denied or deprived of any substantial defense. It is surely not justice that at the end of a long and expensive hearing, a plaintiff should be thrown out of court merely because, out of abundant caution and evidently in ignorance of the real facts, he had united the principal and agent in a suit for the recovery of the value of material and of services and labor rendered on the express order of the agent himself. We do not believe that any such naked technicality should be tolerated in any court, nor do we find that in any case in the courts of our State, any such rule has been recognized, under such facts as were developed in this case, and applied as sufficient reason for throwing a plaintiff out of court. It is furthermore to be observed that the objection of the defendant to the misjoinder of parties was in no manner raised in this case until the report of the referee had come in and was before the court for its action. The misjoinder of parties not appearing on the face of the petition, it could be taken advantage of only by answer. If the misjoinder of parties is not raised by demurrer or answer, it is waived. [R. S. 1899, sec. 602.] It is true that defendant in his amended answers set up the fact that the contract was with plaintiff in behalf of Henry W. Beck, made through Chas. J. Beck, as his agent. But this defense was not set up by way of objection for misjoinder of parties nor in abatement or even in bar of the action but was set up in support of what was alleged to have been the real contract between the plaintiff and the defendant H. W. Beck, through his agent, Chas. J. Beck. The answers, as amended, went further and set up a counterclaim of Chas. J. Beck as against this plaintiff on a demand alleged to have arisen out of this

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Reifschneider v. Beck.

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same transaction. In this state of the record we would feel that we were doing rank injustice if we sustained defendant in the position which he now takes, and should hold, that by having dismissed as to Chas. J. Beck, plaintiff necessarily went out of court as to his whole action. We decline to take any such ground.

Under the Statute of Jeofails, Revised Statutes 1899, section 657, it was entirely competent for the court on the coming in of the report of the referee and before final judgment and in furtherance of justice, to allow the dismissal and the amendment, all done to conform the pleadings to the facts proven.

The point is made, that in dismissing as to Chas. J. Beck, the court lost jurisdiction against Henry W. Beck by reason of his being a resident of the city of St. Louis and not of St. Louis county, service in the county having been had on Chas. J. Beck alone, Henry W. Beck having been served outside of the county. This objection is disposed of by the statement, that no such point was made in the lower court. Henry W. Beck appeared and answered to the merits. Without any objection so far as appears by the record in the case, after the dismissal of the cause as against Chas. J. Beck, Henry W. Beck pleaded, appeared and made motions going to the merits and participated in the trial of the cause without suggestion of lack of jurisdiction of the court over his person. If that jurisdiction was lacking originally, as it was merely to the person and was a personal privilege of the defendant, Henry W. Beck, he waived it by his action and by his failure to raise it in apt time. This is so fully covered by the decision of the Kansas City Court of Appeals in *Rider v. Kirk*, supra, a case in this particular feature almost parallel to the case at bar, that it is unnecessary to dwell on it.

Finding no error in the record of proceedings to the real prejudice of the defendant, the judgment of the circuit court is affirmed. All concur.



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## APPEALS.

**Prohibition: Denial of Writ: Appealable Order.** Under section 4455, Revised Statutes 1899, declaring any final judgment in prohibition reviewable by appeal, an appeal lies from a final judgment on the merits, authorized by section 4454, denying the writ, although no preliminary rule was awarded. *Ostmann v. Frey*, 271.

**APPELLATE PRACTICE.** See Trial Practice, 5.

1. **No Exception to Overruling of Motion for New Trial.** Where no exception is saved to the overruling of a motion for a new trial, nothing is left for review, on appeal, except the record proper. *State v. Walters*, 52.
2. **Finding by Chancellor.** In an equity case, the appellate court will defer to the finding of the court below, where it is in doubt as to which of two theories is the correct one under the evidence. *Gerardi v. Christie*, 75.
3. **Abstract: Sufficiency of.** Under court rules 14 and 15, providing that, where a case is brought up by a full written transcript, the plaintiff in error shall deliver a copy of his abstract of the record to respondent and file copies with the clerk, and that it shall contain a complete index and must

**APPELLATE PRACTICE—Continued.**

set forth so much of the record as is necessary to a complete understanding of all questions presented for decision—that is, an abstract of the record proper, and all matters of exception—a statement containing no reference as to when a bill of exceptions was filed, no exceptions to rulings on evidence, or on instructions, or to overruling a motion for a new trial, save an exception to overruling the demurrer to the evidence at the close of plaintiff's case, and no summary of pleadings, except a reference to some of the counts in the petition, following which is a synopsis of the testimony for plaintiff and defendant, and this followed by a heading "Assignment of Errors" and then by the heading "Argument, Points and Authorities," is not an abstract such as is required by said rules. *Sprague v. Mathias*, 169.

4. **Necessity of Exception to Overruling of Motion for New Trial.** Where no exception is saved to the overruling of a motion for a new trial, the appellate court will not review proceedings at the trial, nor notice any errors not appearing in the record proper. *Ib.*
5. **Non-Compliance with Rules: Affirmance of Judgment.** Where, under court rules 14 and 15, there is no abstract of the record, the absence of which would authorize the dismissal of a writ of error, and in addition there is a failure to except to the overruling of the motion for a new trial, and the judgment is sustained by the petition and is in accordance with the issues, the judgment will be affirmed. *Ib.*
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## APPELLATE PRACTICE—Continued.

the bill of exceptions has not been filed or exceptions saved to the overruling of a motion for a new trial. *O'Connell v. Transit Co.*, 416.

13. **Waiver of Error.** Errors in the trial of a cause may be waived by counsel for appellant on the oral argument in the appellate court. *Dean v. Railroad*, 429.
14. **Discretion of Trial Court: Refusal to Set Aside Default: Counsel Engaged in Attending to Other Cases.** An application to set aside a default judgment on the ground that counsel for defendant was engaged in other cases and was misled by the state of the docket and thus permitted a judgment by default is addressed to the sound discretion of the trial court. and its refusal to grant relief does not indicate an abuse of discretion for which alone its action may be reversed on appeal. *Sigaloff v. Breweries Cos.*, 452.
15. **Same: Sufficiency of Application to Set Aside Default.** An appellate court will not interfere with the refusal of the trial court to set aside a default judgment unless defendant discloses to the trial court a meritorious defense, that his failure to appear was induced for some good reason, and that notwithstanding the exercise of due diligence to be present in court he was precluded from so doing; and a statement in general terms that defendant has a meritorious defense is not sufficient, it being necessary to set out the facts relied upon as a defense. *Ib.*
16. **Revivor: Foreign Executor: Statute.** Where plaintiff in error died, the action could not be revived in the name of his personal representative, a foreign executor under Laws 1905, page 95, where there was no showing that the laws of the State where deceased died, nor those of the State where the cause of action accrued, authorized such executor to prosecute the action in his name. *Thorpe v. Weismann*, 559.
17. **Appeal from Order Overruling Motion to Tax Costs: Necessity of Bill of Exceptions.** Where a bill of exceptions is not filed, no exception to the action of the trial court in overruling a motion to tax costs are before the appellate court for review, and the presumption always being in favor of the regularity and correctness of the action of the trial court, its judgment will be affirmed. *Ib.*
18. **Grounds not Passed on by Trial Court.** Where a demurrer to a petition assigning several grounds of demurrer was sustained on one of the grounds only and on appeal it is determined the court was in error in so doing the judgment will be reversed and the cause remanded in order to give the trial court an opportunity to pass on the other grounds assigned in the demurrer, as the appellate court is a court of review and acts on such matters only as have been passed upon by the trial court. *Briscoe v. Longmire*, 594.
19. **Conclusiveness of Court's Finding.** Where no declarations of law are asked or given and no exceptions saved to the introduction of evidence, it being impossible to determine the trial court's theory, its finding will not be disturbed on appeal. *Oellien v. Duncan*, 600.

## APPELLATE PRACTICE—Continued.

20. **Review of Trial Court's Discretion in Allowing Amendments: Pleading: Trial Practice.** An amended pleading must present a good cause of action or a substantial defense, to entitle it to be filed; and hence where it is sought to have the discretion of the trial court in refusing to allow an amended pleading to be filed reviewed, it must appear to the appellate court that the pleading tendered presented a substantial cause of action or a substantial defense. *Stove Repair Co. v. Cornwall*, 605.
21. **Same: Preservation for Review: Bill of Exceptions.** Where a proposed amended answer was stricken from the files, error in refusing it cannot be reviewed unless it is called for by or contained in the bill of exceptions. *Ib.*
22. **Same: Record Proper.** An amended answer which was stricken from the files is not a part of the record proper on appeal, even though the clerk or counsel copied it into such record. *Ib.*
23. **Criminal Practice: Sufficiency of Information: Failure to Preserve Motion to Quash in Bill of Exceptions.** A motion to quash an information not preserved by bill of exceptions cannot be considered on appeal, though it appears in the record proper. *State v. Boehler*, 614.
24. **Same: Objection to Introduction of Evidence.** Where an objection is made to the admission of testimony on the ground the information states no offense and exceptions are duly preserved to the action of the court in overruling it, the sufficiency of the information is properly before the appellate court for review. *Ib.*
25. **Review of Referee's Finding.** An appellate court may, on motion of either party, review a referee's findings, and affirm or reverse the judgment in whole or in part. *Reifschneider v. Beck*, 725.
26. **Conclusiveness of Finding on Conflicting Evidence.** A finding by a referee selected by the parties will not be disturbed on appeal, where it is based on conflicting evidence and has been affirmed by the trial court. *Ib.*

## ASSAULT AND BATTERY.

1. **Sheriffs: Arrest Under Warrant: Evidence: Warrant Competent Evidence.** In an action on a sheriff's bond, for assault and battery alleged to have been committed on relator by the sheriff in making an arrest of relator under a warrant, it devolved on relator to show the officer was acting within the scope of his authority in order to affix liability against a surety on the bond, and the warrant itself was the best evidence of that fact. *State ex rel. v. Hines*, 289.
2. **Same: Exclusion Harmless Error.** But where the answer expressly admitted that the sheriff was acting under a warrant, the exclusion of the warrant was harmless error. *Ib.*
3. **Same: Dismissal of Charge Immaterial.** That the charge against one, on which the warrant on which he was arrested was issued, was afterwards dismissed without prosecution, is immaterial in an action for assault and battery by sheriff in making the arrest. *Ib.*

## ASSAULT AND BATTERY—Continued.

4. **Same: Powers of Officers.** An officer in making an arrest may use such force as appears to him at the time to be reasonably necessary to overcome the resistance put forward, but he is not required to nicely gauge the precise quantum of force necessary to overcome the resistance. *State ex rel. v. Hines*, 289.
5. **Prima-Facie Case.** In a civil action for damages on account of an assault and battery between private persons, a prima-facie case is made by merely showing defendant applied a very slight degree of force to plaintiff in anger, and it then rests with defendant to justify it. *Ib.*
6. **———: Sheriffs: Arrest Under Warrant: Use of Necessary Force: Burden of Proof.** The burden of proof, in a suit against an officer and the surety on his bond for assault and battery by the officer in making an arrest under a warrant, is on the one suing to show the officer used more force than was reasonably necessary to effect the arrest; not on defendants to show the contrary, the presumption being that he performed his duty in accordance with the law. *Ib.*
7. **What Constitutes Assault: Violent Language.** A wrongful entry into a residence by a gas company's agent and the frightening of plaintiff so as to cause a miscarriage, by using violent language toward her nurse, when the latter attempted to shut the agent out as directed by plaintiff, was not an assault upon plaintiff. *Bouillon v. Gas Light Co.*, 462.
8. **Civil Action: Two Defendants: Concert of Action Prerequisite to Joint Liability: Instructions.** In an action against two defendants for an assault and battery, an instruction as to each defendant, permitting recovery against him alone, whether he acted independently or in concert with his co-defendant, but omitting to inform the jury that a joint verdict could not be given against both defendants unless there was concert of action between them, was erroneous. *Schafer v. Ostmann*, 644.
9. **Same.** In cases of wilful tort, as assault and battery, there is no joint liability, unless there is concert of action between those who are charged jointly. *Ib.*
10. **Same: Instructions: Error not Cured by Other Instructions.** In an action for assault and battery, instructions permitting recovery against each defendant if he acted independently, and omitting to inform the jury that no joint verdict could be given against both defendants unless there was concert of action between them, were not cured by an instruction that humiliation and disgrace were competent matters to be considered, if caused by the acts of defendants acting independently or in concert, and that if the assault was made by defendants in concert, or either of them, exemplary damages could be allowed, etc., for by this instruction the jury were given to understand that in computing damages it was immaterial whether defendants acted in concert or independently. *Ib.*
11. **Same.** Nor were said instructions cured by an instruction directing the form of verdict to be returned if it was found that the two defendants acted in concert and maliciously made the assault, there being nothing in the instruction to inform

**ASSAULT AND BATTERY—Continued.**

the jury that in no instance would it be proper for them to allow a joint recovery against defendants in the absence of it appearing they acted in concert. *Schafer v. Ostmann*, 644.

12. **Joint Liability: Evidence: Damages: Pecuniary Circumstances of One Defendant not Admissible.** In an action for assault and battery against two defendants jointly, evidence of the pecuniary condition of one of the defendants alone is not admissible. *Ib.*

**ASSIGNMENT.**

1. **Partial Assignment Without Assent of Debtor: Equity.** Equity will not enforce a claim based upon a partial assignment of the fund, where the debtor has not assented to the assignment. *Bland v. Robinson*, 164.
2. **Powers of Assignee: Corporations.** Under section 365, Revised Statutes 1899 the assignee of a corporation for the benefit of its creditors has full power to represent the creditors in actions on obligations for stock subscriptions to the corporation. *Sherman v. Shaughnessy*, 679.

**ATTACHMENT.**

1. **Jurisdiction: Misnomer of Defendant.** In attachment, jurisdiction over the subject-matter is obtained by the levy thereon of a writ properly issued, and no matter what error or irregularities may subsequently occur, the *res* remains in the grasp of the court, and its judgment in regard thereto will be valid until reversed or set aside in a direct proceeding for that purpose; and hence an attachment levy on property was not void because defendant, a married woman, was sued by her maiden name. *Thompson v. Paddock*, 145.
2. **Priority of Liens.** The levy not being a nullity, one subsequently bringing the attachment could not acquire priority, under section 415, Revised Statutes 1899, where he knew when he levied his writ that the other plaintiff had sued and levied on the property, and knew the amount of claim and did not think of opposing the attachment, or that he could do so, until after he had ascertained the mistake in defendant's name, when he seized on the mistake as a means to obtain a lien prior to the other plaintiff's, which he had previously endeavored to get out of the way by a settlement. *Ib.*

**ATTORNEY AND CLIENT. See Corporations, 11.**

1. **Attorney's Lien: Lien Held Not to Attach: Sufficiency of Notice.** Where a distributee of an estate being administered entered into a contract with an attorney, by which he was to be paid a percentage of the amount recovered in probate proceedings, which contract was filed in the probate court, the "Attorney's Lien Law" (Acts 1901, page 46), has no application as against the administrator of the estate and the purchaser of such distributee's interest, and moreover the attorney did not bring himself within its provision by serving the notice required by that statute, the only attempt to give notice being the filing of the contract in the probate court. *Bland v. Robinson*, 164.

**ATTORNEY AND CLIENT—Continued.**

2. **Attorney Purchasing Land Belonging to Client at Trustee's Sale: Trusts.** Where the administrator and heirs decided not to bid in land sold under a first trust deed in order to protect a second trust deed held by the estate, an attorney for the administrator could buy the land for his own benefit. *Ewing v. Parrish*, 492.
3. **Attorney Purchasing Land Belonging to Client at Trustee Sale: Action for Profits: Suit in Equity Proper Remedy: Trusts.** Where the attorney for an administrator bought with his own money, without the administrator's knowledge, land sold upon foreclosure of a senior deed of trust, upon the decision of the administrator and heirs not to protect a junior lien held by the estate, an action by the administrator against the attorney for profits made in the transaction on the theory he bought as trustee for the estate could not be established by a demand presented in the probate court, a suit in equity being the proper remedy. *Ib.*
4. **Employment of Attorney: Evidence.** In an action by an attorney against a corporation and a stockholder thereof for services performed for the corporation in collecting fire insurance under an alleged contract of employment, the fact that the individual defendant's interest in the policy was only that of a stockholder was a circumstance to be weighed by the jury on the issue whether he was personally liable to plaintiff, there being nothing in the situation to preclude a finding of dual employment. *Clay v. Brown*, 541.
5. **Same: Failure to Answer Letters: Instruction.** In an action by an attorney against a corporation and its president for services performed for the corporation, under an alleged contract of employment by both defendants, where there was evidence that the attorney wrote several letters to the president, stating that he had been employed, to which the latter failed to reply, an instruction that the failure to answer plaintiff's letters did not constitute an admission of defendant's liability under the contract alleged to have been made was erroneous, since, although such failure was not equivalent to an admission of liability, still it was a circumstance to go to the jury on the question whether a contract of employment had been made. *Ib.*
6. **Same: Evidence: Admissions.** In an action by an attorney against a corporation and a stockholder thereof, for services in collecting insurance money, admissions made by the individual defendant as to the employment were competent against him, whether he was interested in the insurance money other than as a stockholder or not, or whether he was at the time acting as agent for the company. *Ib.*

**BANKS. See Bills and Notes, 5.**

1. **Evidence: Admissions: Entries in Passbook.** Where an entry in a bank depositor's passbook was cancelled by the bank on first detecting it, and the evidence tended to show it was erroneous, it could not be regarded as an admission by the bank. *Lucks v. Bank*, 376.
2. **Action by Depositor: Evidence: Entries in Passbook.** In an action against a bank by a depositor for a balance claimed to be due him on his account, entries in his passbook proved to have been made by the bank's officers make a prima-facie case in his favor. *Ib.*

**BANKS—Continued.**

3. **Same: Instructions: Singling Out Facts.** Where, in an action against a bank for a deposit, it appeared the bank cancelled its entry in the depositor's passbook on first detecting it and offered testimony to prove the entry was erroneous, an instruction that the entries made by the bank on the depositor's passbook were admissions by the bank that the amounts so entered were deposited by the depositor, was erroneous, because giving undue emphasis and weight to the entry. *Lucks v. Bank*, 376.

**BILLS AND NOTES.**

1. **Negotiable Instrument Law: Time of Taking Effect.** The General Assembly which enacted the "Negotiable Instrument Law" (Acts 1905, p. 243), having adjourned March 18, 1905, and the act containing no emergency clause, and its operation not being postponed beyond the constitutional ninety days, it became effective June 16, 1905. *Bank v. Bank*, 1.
2. **Same: Payment is "Acceptance."** The payment of a check or bill of exchange by the drawee is equivalent to its "acceptance," under section 188 of the Negotiable Instrument Law, which provides that "where the holder of a check procures it to be accepted or certified, the drawer and all endorsers are discharged from liability thereon." *Ib.*
3. **Same: Payment of Forged Check: No Right of Recovery Against Endorser.** Under sections 62, 185 and 188 of the "Negotiable Instrument Law," a drawee who pays to a bona fide holder of a check, to which the drawer's name has been forged, the amount of the same cannot recover such amount from the holder, the latter not being bound to determine at his peril that the drawer's signature was forged and the genuineness of that signature being vouched for by the drawee when it cashed the checks. *Ib.*
4. **Same: Payment of Check.** The endorsement and presentation of a check by a holder and its payment by the drawee do not constitute a negotiation of the check, but constitute a payment. *Ib.*
5. **Payment of Forged Check: Banks: Clearing House Rules.** Under a clearing house rule, providing that all checks received at the clearing house, and not returned to the clearing bank on the same day before 2 o'clock, shall be deemed to have been paid with like effect as though they had been paid in currency at that hour by the bank on which they are cleared, a bank which did not return within the required time a check presented by another bank for payment was chargeable with the consequences of disregarding the rule, and could not recover the amount paid thereon, though the check was forged and the payee bank was not injured by the delay. *Ib.*

**BILL OF EXCEPTIONS.** See Appellate Practice, 21; Trial Practice, 3.

**Extension of Time for Filing: Ineffective, when.** An extension of time for filing a bill of exceptions granted after the expiration of the period first fixed is ineffective. *State v. Walters*, 52.

**BUILDING RESTRICTIONS.**

1. **Construction: Whether Building is "Flat" is Question of Fact.** The word "flat" in a building restrictive covenant, prohibiting the erection of flats or tenement houses, has no technical meaning, and, where the testimony is conflicting as to whether a building is a flat or not, the question is one of fact. *Godfrey v. Hampton*, 157.
2. **Same.** The court, in construing restrictive covenants in a deed, should keep in mind the purpose to be achieved by the covenant. *Ib.*
3. **Same: Erection of Flats.** The purpose of a restrictive covenant in deeds of lots abutting on a street prohibiting the erection of flats or tenement houses is to prevent a house from being used by more than one family, each living by itself on different floors, fitted up separately for housekeeping, and a construction of the covenant which will permit a two-story dwelling arranged for the use of two families, each keeping house by means of fixed conveniences on each floor, and each using a common front entrance and each having separate entrances in the rear, will defeat the object thereof. *Ib.*
4. **Same: Evidence Held to Support Court's Finding.** In an action to restrain a violation of restrictive covenant prohibiting the erection of flats, evidence held to sustain the finding of the court that a certain scheme of improvement projected by defendant would convert her building into one of the character known as "facts," and therefore would violate the covenant. *Ib.*

**BURDEN OF PROOF.** See *Assault and Battery*, 6; *Common Carriers*, 5; *Life Insurance*, 2.

**CARRIERS OF PASSENGERS.**

1. **Relation of Carrier and Passenger Created by Contract: Choice of Remedies for Breach.** Generally speaking, the relation of carrier and passenger arises out of contract, express or implied, and the party suffering injury from a breach of it may sue on the contract or he may waive the contract and sue in tort. *Trout v. Livery and Undertaking Co.*, 622.
2. **Sick Passengers: Degree of Care Carrier Required to Use.** If a common carrier accepts a passenger known to be sick or enfeebled, it is bound to exercise for his safety a degree of care commensurate with the responsibility assumed which would be such a degree of care as is reasonably necessary to protect the passenger from injury, in view of his physical condition. *Ib.*

**CHATTEL MORTGAGES.**

1. **Liability of Purchaser from Mortgagor: Agreement to Assume Mortgage.** A promise by one who purchased two chattels to pay notes secured by a mortgage on one of the chattels as part consideration for the sale would not charge the other chattel with the lien of the mortgage as against him, although it was covered by the mortgage, the copy filed with the Recorder not showing that fact and the buyer having no knowledge of it. *Bauer v. Implement Co.*, 653.

**CHATTEL MORTGAGES—Continued.**

2. **Same: Effect of Failure to Record.** Generally, a chattel mortgage is not good against anyone but the parties to it, if it is not recorded, and a buyer is protected from the effect of such an instrument, if by some mistake in recording it its true effect is not shown. *Bauer v. Implement Co.*, 653.
3. **Same: Effect of Purchaser Acquiring Knowledge of Mortgage After Buying.** Where one acquires title to chattels without notice or knowledge of a mortgage thereon, the fact that he subsequently learned thereof would not make it enforceable against him. *Ib.*

**COLLATERAL ATTACK.** See *Guardian and Ward*, 8, 10.

**COMMON CARRIERS.**

1. **Contracts: Place of Performance.** Where a citizen of California, starting with his baggage on the return trip from St. Louis to San Francisco, tendered, and the carrier accepted, his baggage pursuant to the terms of his ticket, which was purchased in San Francisco, whereby it became the duty of the carrier to transport the baggage from St. Louis to San Francisco, and there deliver it to the passenger, the place of performance of the contract was San Francisco. *Robert v. Railroad*, 96.
2. **Same: Law Governing.** A contract evidenced by a railroad ticket is governed by the law of the place where it is made; and hence, where a passenger bought a return ticket in California, the law of that State governs its performance, unless the authority of its laws should be repudiated, because repugnant to the law and policy of this State, or as not affecting the contract as because it was one for interstate carriage and subject to regulation by Congress. *Ib.*
3. **Limiting Liability for Property Lost: Interstate Commerce: State Regulations.** Congress has enacted no law prohibiting agreements regarding the value of the property offered to carriers for interstate shipment and limiting the amount for which they will be liable if the property is lost while in their custody, and the national courts have sanctioned agreements between carriers and owners of property limiting the liability of the carrier for property received for carriage and lost during transit, provided such agreements are just, reasonable, and fairly entered into by the owner, and for a consideration; and such courts enforce State statutes regulating limitations of liability of carriers for interstate shipments in the absence of legislation by Congress. *Ib.*
4. **Same: Consideration Necessary.** A stipulation in a ticket or bill of lading limiting the liability of a common carrier in order to be valid must be supported by an independent consideration, which is usually or invariably a lower fare or freight rate than the carrier charges for the same transportation under ordinary liability. *Ib.*
5. **Same: Differences in Application of Rule in State and Federal Courts: Burden of Proof.** The same rule with respect to requiring a consideration to support a stipulation for limiting the liability of a common carrier obtains in the Missouri and the Federal courts, but the former impose the burden of proving a consideration on the carrier, while the latter impose it on the shipper, presuming in favor of a consideration. *Ib.*



## COMMON CARRIERS—Continued.

6. **Limiting Liability for Property Lost: Stipulating Value: Consideration.** A stipulation of value contained in a ticket or bill of lading, if reasonable and made under proper conditions by the passenger or shipper, is regarded here, not as a restriction of the carrier's responsibility for negligence, but as a liquidation of the damages recoverable in the event the property is lost or damaged in any manner for which the carrier is answerable. *Robert v. Railroad*, 96.
7. **Same: Public May Insist on Shipping Without Limitation.** The public may insist on property being accepted for transportation by carriers without any limitation of their responsibility. *Ib.*
8. **Reduced Rate: What is.** A "reduced rate" given by a carrier must be one fixed lower than another rate which is offered to the public, and the sale of a return trip ticket at a price less than two single trip fares is not a reduced rate. *Ib.*
9. **Limiting Liability for Loss of Property: Statutes of California Construed: Consideration Necessary.** California Civil Code, section 2174, provides that the obligation of a carrier cannot be limited by general notice on his part, but may be limited by special contract; section 2175 provides that a carrier cannot be exonerated by any agreement, made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants; section 2176 provides that a passenger, by accepting a ticket or written contract for carriage with the knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated, and also the limitation stated therein upon the amount of the carrier's liability for trunks lost or injured, when the value of such property is not named, but his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same. *Held*, that an independent consideration for a limitation of the common law liability such as a reduced rate of fare or freight is essential; and, where a passenger bought a ticket in California to St. Louis and return, which limited the carrier's liability for loss of baggage, and the carrier did not have for sale an unrestricted liability ticket, so that the passenger had no choice of contracts, the ticket he bought was not sold at a reduced rate, so as to be consideration for limitation of liability, and upon loss of the baggage on the return trip he could recover therefor free from limitations. *Ib.*
10. **Limiting Liability: Prerequisite to Validity of Limitation.** Though carriers may restrict their liability as insurers, such privilege is for the benefit of the public, as well as of carriers, and does not permit the carriers to impose conditions restricting liability, whether patrons desire such terms or not, but for such a limitation to be valid the carrier must be willing to assume the full responsibility imposed by law, and must allow the owner the privilege of choosing between a restricted and full liability. *Ib.*
11. **Same: Acceptance of Ticket or Bill of Lading Without Protest.** Usually the acceptance, without protest, of a ticket or receipt for property, issued by a carrier and containing restrictions of the carrier's liability, will be treated as an assent by the patron to the terms of the receipt or ticket; and the carrier need not offer an option between the two classes of contracts, but it is sufficient if the patron could have had the unrestricted contract had he demanded it. *Ib.*  
148 App.—48.

**COMMON CARRIERS—Continued.**

12. **Loss of Baggage: Gross Negligence.** The misrouting of baggage by a carrier at a junction point is strong proof of gross negligence. *Robert v. Railroad*, 96.
13. **Baggage Defined.** "Baggage" means those articles of personal convenience and adornment usually taken by a passenger on a journey or visit, and suitable to his station in life and social standing. *Ib.*
14. **Delay in Transportation: Pleading: Action in Tort.** A petition in an action by a shipper against a carrier, which alleges that the carrier received certain corn for shipment, and agreed well and safely to carry it to destination and deliver it in as good condition as when received, and that, in violation of its agreement and in disregard of its duties, it so negligently conducted itself as to cause damage to the property, in that it negligently delayed transportation and delivery after arrival at destination, states a cause of action in tort, and not in contract, the averment that defendant agreed well and safely to carry the corn to destination and deliver it in as good condition as when received being intended as matter of inducement and to show defendant undertook with plaintiff to act as a common carrier, thus serving as a basis for essential averments showing it violated the duties imposed on it as a common carrier. *Hall Grain Co. v. Railroad*, 308.
15. **Same: Variance Between Pleading and Proof.** The variance between a petition, in an action by a shipper against a carrier, which alleges that the carrier agreed to deliver at designated places to third persons, and the proof, which shows that the bills of lading named the shipper as consignee and contained directions to notify the third persons, is immaterial as the carrier undertook to turn the freight over at destination to the third persons, on their presenting the bills of lading showing they were the persons authorized to take charge of the shipments. *Ib.*
16. **Same: Rule of Terminal Carrier for Precedence in Handling Cars: Proximate Cause: Question of Fact.** Where a carrier of corn for delivery to an elevator for drying, negligently delayed the transportation, and thereby caused the cars to lose the precedence they would have enjoyed if carried promptly, under a rule providing for the sending of cars to the elevator in the order of their arrival, the question of the liability for injury to the corn, in consequence of its late arrival at the elevator, was one of fact, on it being assumed the rule afforded a valid excuse for failure to deliver promptly. *Ib.*
17. **Same: Change of Climate Causing Damage: No Defense.** Where in an action against a carrier of corn for delivery to an elevator for drying, the evidence showed the corn would not have spoiled if it had been turned into the elevator on arrival, the carrier could not relieve itself from liability on the ground the corn spoiled in consequence of a change of climate. *Ib.*
18. **Rule of Terminal Company for Precedence in Handling Cars: Does not Relieve Carrier from Liability.** A carrier had an arrangement with an elevator company by which it turned into the elevator for storing and drying any grain that arrived

## COMMON CARRIERS—Continued.

in its yards. It was the rule of the railroad to turn into the elevator such cars in the order of their arrival in the yards. The elevator was not a party to prescribing this rule, nor had it agreed to be bound by it. A shipper who delivered corn to the carrier for delivery at the elevator for drying had no knowledge of this rule. The carrier was negligent in delaying the transportation of the corn, and in delivering the same after arrival to the elevator, so that the corn spoiled. *Held*, that the carrier was liable for the injuries sustained, because it was bound to deliver the corn in a reasonable time, and where the consignee called for the same within a reasonable time, notifying the carrier that the corn was shipped to be dried and required immediate handling the refusal to deliver because there were other car loads of grain that had precedence under its rule did not relieve it from liability. *Hall Grain Co. v. Railroad*, 308.

19. **Same: Failure to Present Bill of Lading.** A carrier delaying the delivery of freight may not exercise the delay on the ground that the bills of lading were not presented, where it did not decline to deliver because thereof. *Ib.*
20. **Carriage of Freight: Perishable Goods: Presumption of Good Condition: Evidence.** Goods delivered in good order to an initial carrier are presumed to continue so until they get into the possession of the final carrier, even though they are perishable. *Dean v. Railroad*, 428.
21. **Same: Injury in Transit: Damages: Difference in Market Price at Destination.** In an action against a carrier for damages sustained en route to a shipment of goods, an instruction on the measure of damages setting two markets, that at the point of shipment and that of the destination, is erroneous. *Ib.*
22. **Same: Freight Charges.** A shipper whose peaches were injured in transit, was liable in an action against the carrier for damages for at least the freight charges on so much of the carload as he received, though not liable for charges on the damaged part of the peaches. *Ib.*
23. **Carriage of Freight: Injury in Transit: Evidence: Admissions by Agent.** In an action against a railroad for injury to goods in transit, a letter from defendant's freight agent to plaintiff, rejecting the latter's claim for damages and referring to the icing of the car as shown by an agent's reports, was not hearsay, but was admissible as an admission by the agent in the course of his duty. *Ib.*
24. **Carriage of Freight :Injury in Transit: Pleading: Defenses.** In an action against a railroad for injury to peaches in transit, defendant, if it wished to avail itself of the defense that the contract of shipment only required the icing of the car at a certain point designated by plaintiff, should have invoked the provision of the contract by which plaintiff was claimed to have directed the icing of the car, and alleged obedience to his directions. *Ib.*
25. **Breach of Contract: Damages: Punitive Damages Allowed, When.** Punitive damages are allowed for a breach of

**COMMON CARRIERS—Continued.**

- duty by a common carrier, only when the action proceeds as for the tort in violating the obligation laid upon the common carrier by law, and not when the action proceeds for breach of contract. *Trout v. Livery and Undertaking Co.*, 622.
26. **Carriage of Freight: Delay: Liability of Connecting Carrier.** Where an initial carrier and a connecting carrier had an arrangement for the transportation of live stock at a through rate, the connecting carrier, if guilty of delay in transporting, was liable for the damages sustained. *Wilburn v. Railroad*, 692.
27. **Same: Question for Jury.** Whether a delay of ten to thirteen hours in the transportation of live stock by a connecting carrier was beyond its power to prevent, or because it did not transport the stock by the first available train, *held*, under the evidence, for the jury. *Ib.*
28. **Same: Terminal Carrier: Agency.** Where an initial carrier and a connecting carrier made an arrangement for transportation of live stock at a through rate, a part of which went to a terminal carrier with whom the connecting carrier had an agreement for sending its freight by the terminal carrier on payment of a fixed compensation, the terminal carrier was, in the absence of any showing to the contrary, the agent of the connecting carrier, so that the latter was liable for any delay of the terminal carrier in transporting cattle. *Ib.*
29. **Same: Joinder of Initial and Connecting Carriers: Carrier Guilty of Negligence Liable: Statute.** Under section 5022, Revised Statutes 1899, as amended by Laws 1905, p. 54, authorizing a shipper suing for injury to freight to join as defendants the original carrier and all connecting carriers, and to recover from the carrier through whose negligence the loss was sustained the amount thereof, a shipper of live stock who sues the initial and connecting carriers jointly for damages occasioned by a delay in transportation may only recover from the carrier responsible for the delay. *Ib.*

**CONSIDERATION.** See *Common Carriers*, 4, 6, 9.

**CONSTRUCTION.** See *Building Restrictions*, 1, 2, 3; *Contracts*, 4; *Husband and Wife*, 6; *Landlord and Tenant*, 1; *Life Insurance*, 16; *Pleading*, 1; *Real Estate Broker*, 3; *Statutes*.

**CONTRACTS.** See *Common Carriers*, 1, 2, 25; *Corporations*, 15; *Fraud and Deceit*; *Husband and Wife*, 6; *Livery Stable Keepers*, 1, 2, 3; *Principal and Agent*; *Real Estate Brokers*, 1, 2, 3.

1. **Mutuality: Unilateral Contracts.** To make a contract "unilateral," and thereby void, there must be no mutuality of obligation, and only one party thereto must be bound thereby. *Iron & Rail Co. v. Railroad*, 173.
2. **Same.** For a contract to be "mutual," an obligation must rest on each party to do or permit to be done, something in consideration of the act or promise of the other; that is, neither party can be bound, unless both are bound. *Ib.*
3. **Same: Contract Held Void.** A memorandum of sale between an iron company and a railroad company, reciting that the for-

**CONTRACTS—Continued.**

mer obligated itself to furnish such material of a certain kind as it might have, and that such material was subject to the inspection of the railroad company, is unilateral. *Iron & Rail Co. v. Railroad*, 173.

4. **Construction: Effectuating Intent: Equity.** Where the intention of the parties to a contract is clearly manifest or can be ascertained with reasonable certainty, equity will carry it out, though the form of its expression may be defective, either in non-compliance with some specific rules or even conditions of the law itself. *Walsh v. Trust Co.*, 180.
5. **Not to be Varied by Parol Evidence: Evidence.** A written contract may not be varied by parol evidence of the intent of the parties before executing it. *Renfro v. Insurance Co.*, 258.
6. **Contract by Correspondence: Necessity of Proving Acceptance.** Where a contract is declared on as created by correspondence, the correspondence must show that the terms offered by one party were accepted by the other. *Union Service Co. v. Drug Co.*, 327.
7. **Same.** Where a proposal by one party is not assented to by the other party, but instead the response contains a variation of the terms, this becomes a counter-offer, which must be accepted to form a contract; and if the answer to it departs from the terms proposed, in some respect, another offer is made. *Ib.*
8. **Same: Facts Stated.** Where plaintiff wrote to defendant offering to furnish six horses and vehicles for \$43 a month for two years, and defendant replied offering to take four vehicles as long as the price and outfits were satisfactory, to which plaintiff replied, stating it was in receipt of defendant's letter accepting plaintiff's proposition and saying "whereby we will furnish you with four storm buggies and outfits complete for a period of two years," to which letter defendant did not reply, there was no contract, because plaintiff's first offer was not accepted by defendant, who submitted a counter-proposition which was not accepted; and the letters do not justify the construction that defendant agreed to accept the service of four vehicles for two years, provided the price and outfits were satisfactory. *Ib.*
9. **Letters: Legal Effect: Question for Court.** The effect of letters alleged to constitute a contract by correspondence is for the court; and a party is not entitled to have the question of whether a contract has been formed, and, if so, on what terms, submitted to the jury. *Ib.*
10. **Telephone Conversation.** A valid contract can be made by telephone conversation. *Flooring Co. v. Knost*, 563.
11. **Procuring Loan: Modification.** A contract, by which the owner of property authorized an agent to procure a loan for a commission and agreed to furnish a certificate of title showing the title to be clear of all liens and taxes for the current year, clearly expressed the intention of the parties, and the agent could not thereafter annex new conditions thereto, by requiring the owner to give bond against mechanics' liens by persons then erecting a house on the property, or to procure subcontractors' and materialmen's receipts from such persons. *Oellien v. Duncan*, 600.

## CONTRACTS—Continued.

12. **Suit May be Brought on Quantum Meruit, Although Express Contract Exists: Measure of Recovery.** One who has furnished work and labor under a contract fixing the price may abandon the contract and sue on a *quantum meruit* or *quantum valebat*, but the measure of recovery would be the amount stated in the contract. *Reifschneider v. Beck*, 725.
13. **Action on Contract: Pleading: Recovery Confined to Theory Pleaded.** One suing on a special contract must recover on it or not at all, and, conversely, where one sues on a *quantum meruit* or *quantum valebat* he cannot recover on a special contract. *Ib.*
14. **Same: Amendment: Conforming Petition to Evidence.** Under the Statute of Jeofails (section 657, Revised Statutes 1899) authorizing the amendment of pleadings, etc., before judgment, in furtherance of justice, it was not prejudicial error to allow one who sued on a joint contract to dismiss as to one of the two defendants and amend so as to show single liability of the other, after the referee's report, to conform to the evidence, where the answers pleaded that one of the defendants acted as agent for the other. *Ib.*
15. **Same: Assumpsit: Joint Liability.** In an action for labor performed and material furnished, under allegations in the petition that the labor was performed and the materials were furnished at the instance and request and for the use and benefit of two defendants, the action may be one of joint assumpsit. *Ib.*

**CONTRIBUTORY NEGLIGENCE.** See *Livery Stable Keeper*, 9; *Master and Servant*, 21, 22, 24; *Municipal Corporations*, 5.

## CORONERS.

1. **Inquest not Court of Record.** Under the common law in England, a coroner's inquest was a court of record, but it is not so regarded in this country. *Queatham v. Modern Woodmen*, 34.
2. **Determining Whether Inquest Should be Held.** The exercise of discretion by a coroner with respect to determining whether or not an inquest should be held is an act of judicial character; but aside from this, there is nothing in the statutes according the force and effect of a judicial proceeding to an inquest. *Ib.*

**CORPORATIONS.** See *Assignments*, 2; *Libel and Slander*, 1, 2, 3, 4, 5.

1. **Misappropriation of Assets: Action by Creditor: Parties: Misjoinder.** In a suit by a creditor of a corporation against its officers for misappropriation of assets, the trustee in a deed of trust executed by the corporation for the benefit of all its creditors is a proper party only in case he confederated with the officers in the misappropriation and the deed of trust was executed to further the scheme, which he acceded to with knowledge of the fraudulent purpose. *Grocery Co. v. Hotel Co.*, 513.
2. **Insolvency: Transfer of Assets to Trustee.** A failing corporation may transfer in good faith its assets to a trustee for the benefit of all its creditors, and may confer on the trustee the

## CORPORATIONS—Continued.

power to collect its assets and distribute the proceeds pro rata among the creditors, instead of resorting to a general assignment. *Grocery Co. v. Hotel Co.*, 573.

3. **Same: Setting Aside.** Whether administration of the estate of an insolvent corporation by an assignee or trustee appointed by the corporation will be interfered with by the courts depends on the facts and chiefly on the presence of good or bad faith. *Ib.*
4. **Same: Necessary Parties.** In a suit by a creditor of a failing corporation to set aside a deed of trust executed by the corporation for the benefit of all its creditors, the creditors named in the deed of trust, or at least enough of them fairly to represent the others, are necessary parties. *Ib.*
5. **Same: Presumption Trustee Will Perform Duty: Evidence.** In a suit by a creditor of a failing corporation to set aside a deed of trust executed by the corporation for the benefit of all its creditors, in the absence of proof to the contrary, it will be presumed the trustee will sue on demands owing the corporation, if he should. *Ib.*
6. **Same: Evidence Held Insufficient to Warrant Removal of Trustee.** In a suit by a creditor of a corporation to set aside a deed of trust executed by a corporation for the benefit of all its creditors and to appoint a receiver for the corporation, it is *held*, under the evidence, there was no ground for removing the trustee or for appointing a receiver. *Ib.*
7. **Misappropriation of Assets: Conversion by Officers: Evidence Held Insufficient.** In a suit by a creditor of a corporation against its officers for misappropriation of its assets based on their converting to their own use a specified sum of the assets, evidence *held* insufficient to show conversion. *Ib.*
8. **Purchase of Assets at Public Sale by Officer.** Whether the purchase of property of a corporation at public venue to the highest bidder, at a mortgage sale, by an officer of the corporation, for his own use and benefit, where the corporation had ceased to be a going concern and its officers were no longer managing its business affairs, is unlawful, *quære*. *Ib.*
9. **Retirement of Shares: Validity.** A corporation has no right to pay the holders of shares of its capital stock their face value out of the company's money until the capital stock has been reduced. *Ib.*
10. **Same: Misappropriation: Evidence Held Insufficient.** In a suit by a creditor of a corporation against its officers for misappropriation of its assets in retiring preferred shares of stock, evidence *held* insufficient to show misappropriation in the retirement of the preferred shares. *Ib.*
11. **Officers: Delegation of Power: Employment of Attorney: Attorney and Client.** While the president of a corporation could not delegate any discretion he had as such officer, he might empower his brother to speak to an attorney in behalf of the company, and retain such attorney's services. *Clay v. Brown*, 542.

## CORPORATIONS—Continued.

12. **Pleading: Denial of Corporate Existence.** Where the due incorporation of a foreign corporate plaintiff was not denied by defendant under oath, its incorporation was admitted. *Stove Repair Co. v. Cornwall*, 606.
13. **Subscription to Capital Stock: Evidence Held Insufficient to Establish.** In an action by the assignee of a corporation on an alleged subscription for stock, where, though defendant signed the subscription, it was upon an understanding with the president of the corporation that the corporation would purchase liquor from him and that the corporate officers would be paid only a nominal salary, and the president subsequently refused to comply with these conditions and stated the transaction was cancelled, and no certificate was issued to defendant, he was not named as a stockholder along with the others on the books of the company, and no call was made on him for payment until he was sued years after the date of his alleged subscription, the trier was warranted in finding, if he was not bound to find, that neither the president of the corporation, the corporation itself, nor defendant ever regarded defendant as a shareholder, and there was no contract of subscription that would render him liable. *Sherman v. Shaughnessy*, 679.
14. **Purchase of Treasury Stock: Governed by Law of Sales.** A contract for the sale of stock of a corporation, which, after being issued, was turned into the treasury by its owner and was set aside as treasury stock to be sold for the purpose of raising funds, is a contract of sale and not one of subscription, in the sense subscriptions were taken for the original capital stock; and such a contract is governed by the law of sales of personal property generally. *Ib.*
15. **Sales of Capital Stock: Incomplete Contract.** Where defendant agreed to purchase from the president of a corporation ten shares of its treasury stock upon condition that the corporation agree in writing to purchase all of its liquor from defendant and pay its officers only nominal salaries, the refusal of its president to sign such agreement released defendant from his liability to purchase, the contract not being fully executed. *Ib.*
16. **Sale of Treasury Stock.** Corporate stock may be conveyed to the company by the original subscribers to be sold by it as treasury stock. *Ib.*
17. **Same: Conditions of Sale Concurrent and Dependent.** The conditions and promises assented to by a corporation in the sale of treasury stock are concurrent and dependent, so that neither party can require the other to perform, without first offering to perform himself. *Ib.*
18. **Purchase of Stock: Action for Price: Fraud Good Defense.** Fraudulent representations, inducing the purchase of corporate stock, are a good defense to an action against a purchaser for the price. *Ib.*
19. **Same: Tender of Stock Necessary.** Where a contract for the acquisition of corporate stock is essentially one of purchase, it is essential to a recovery of the purchase price that the stock be tendered, even though the contract is a completed one. *Ib.*



**COURTS.** See Jurisdiction, 1.

1. **Of General Jurisdiction: Power to Quash Writs.** A court of either general or superior jurisdiction has authority to withdraw and quash writs which have been issued as a result of a judgment theretofore given. *Ostmann v. Frey*, 272.
2. **Supreme Court: Effect of Returning Case to Court of Appeals: Title to Real Estate Involved.** Where the Court of Appeals transfers a case to the Supreme Court as directly involving the title to real property, within the exclusive appellate jurisdiction of that court, and that court on motion sends the case back to the Court of Appeals for determination, it will be presumed the Supreme Court conclusively determined the case was not one in which title to real estate was directly involved. *Briscoe v. Longmire*, 594.

**COVENANT.**

**Suit by Next Friend: Attainment of Majority.** Where the real party in interest has, pending the litigation, attained full age, the next friend may in the discretion of the court be dismissed from the case, and judgment entered directly in favor of such party. *Renfro v. Insurance Co.*, 259.

**CRIMINAL LAW.**

1. **Failing to Provide Fire Escapes: "Manager" of Building not Necessarily "Keeper" of it.** The manager of a building is not necessarily a keeper of it, since one might be styled "manager" if his task in connection with an office building was to look after letting the rooms to tenants and collecting rents, while another person was "keeper," had the custody of the building and was charged with looking after its heating, lighting, water supply, toilet arrangements, improvements, repairs and the regulation of its maintenance generally. *State v. Cook*, 383.
2. **Same: Statutes Construed.** Session Acts 1901, p. 219, section 1, requires the owner, proprietor, lessee, or "keeper" of office buildings, etc., more than three stories high, to provide fire escapes. Section 5 makes the owner, proprietor, lessee, or "manager" of a building, required to be equipped with fire escapes, who neglects for sixty days after the act becomes effective to comply with the act, guilty of a misdemeanor. Acts 1903, pp. 251, 252, repealed the first three sections of the act and enacted new sections in their place, but section 1 of the act as amended requires the owner, proprietor, lessee or keeper of such buildings to provide escapes as in the original act. Section 2 provides that, if a fire escape is found upon inspection to be unsafe, the owner, proprietor, lessee, or keeper shall repair it, and section 5 remains unchanged. *Held*, the words "manager of a building," do not necessarily mean the same as "keeper of a building," or denote any particular duties in relation to the building, and one charged as "manager" of a building with violating the act should not be convicted, in the absence of evidence showing his duties made him a "keeper" of the building and required by the statute to provide fire escapes. *Ib.*

**CRIMINAL PRACTICE.** See Appellate Practice, 23, 24.

**DAMAGES.** See Assault and Battery, 12; Common Carriers, 22, 25; Evidence, 6; Livery Stable Keeper, 7, 10; Negligence, 12; Trespass, 2, 3.

1. **Excessive Verdict.** Plaintiff, a school teacher, sustained a contusion of the lower third of the tibia from a defective sidewalk, causing considerable pain and injuring the nerves. At the time of trial, nearly two years afterward, she was still suffering from the injury, and had been disabled from pursuing her vocation for nearly a year. *Held*, a recovery of \$2000 was not excessive. *Howard v. New Madrid*, 58.
2. **Loss of Time: Evidence: Harmless Error.** In an action for personal injuries where evidence concerning the salary paid to plaintiff was received, although the petition did not allege loss of time or earnings, such evidence, whether rightly admitted or not, will not work a reversal of the judgment, where the jury were not authorized in the instruction on the measure of damages to assess damages for loss of time or earnings. *Ib.*
3. **Excessive Verdict.** In an action for personal injuries and damage to a buggy caused by a collision between said buggy and an automobile, a verdict in plaintiffs favor for \$800 is held not to be so excessive as to warrant interference on appeal. *Winfrey v. Lazarus*, 389.
4. **Tort Actions: Remote Damages.** In cases of affirmative wrong, damages are not remote, as distinguishable from proximate, when they are directly traceable to the wrongful act of the tortfeasor. *Bouillon v. Gas Light Co.*, 463.
5. **Punitive Damages: Not Allowed for Breach of Contract; Exceptions.** Punitive damages are not allowed in suits on contract, except for breach of promise of marriage where it appears the breach was made abruptly and with circumstances of humiliation. *Trout v. Livery and Undertaking Co.*, 622.
6. **Exemplary Damages: Allowed When.** Exemplary or punitive damages are allowed in actions of tort, accompanied with circumstances of malice, wantonness, etc. *Schafer v. Ostmann*, 644.

#### DEEDS.

**Time of Delivery: Presumption.** A deed is presumed to have been delivered on the day it was acknowledged, though dated before. *Gerardi v. Christie*, 75.

#### DISMISSAL OF SUITS.

1. **In Open Court: Statute.** Section 1979, Revised Statutes 1899, which authorizes dismissal of suits in vacation, upon payment of costs, has no application to an attempt to dismiss in term time and in open court. *State ex rel. v. Hines*, 298.
2. **Discretion of Court.** Courts have a latent discretion in the allowance or denial of a voluntary termination of a suit by plaintiff, and while its discretion is not to be exercised arbitrarily, yet where the discontinuance or dismissal would be inequitable, it may be denied altogether or granted only on such terms as the ends of justice require. *Ib.*

**DISMISSAL OF SUITS—Continued.**

3. **Order of Court Necessary: Abatement of Suits: Pendency of Prior Action.** It is necessary for the voluntary dismissal of a suit that the court exercise its discretion in the matter and enter an order of dismissal, so that, the plaintiff having merely filed in open court a memorandum dismissing it, it is still pending, and available under a plea in abatement of a second suit on the same cause of action. *Ib.*

**DRAMSHOP KEEPER.**

**Local Option Election: Conviction After Adoption of Local Option Law for Offense Committed Before its Adoption.** This case involves the same questions of law determined in *State v. Walker*, 129 Mo. App. 371, and is determined in conformity with the opinion therein rendered. *State v. Thompson*, 536.

**EQUITY. See Assignments, 1; Contracts, 4.**

**Deals Only With Question Affecting Property.** Equity is concerned only with questions affecting property and it exercises no jurisdiction of wrongs to the person or to political rights, or because the act complained of is merely criminal or illegal. *Brewer v. Cary*, 193.

**EVIDENCE. See Appellate Practice, 10; Assault and Battery, 1, 2, 3, 4; Attorney and Client, 4, 6; Banks, 1, 2; Building Restrictions, 4; Common Carriers, 20, 23; Contracts, 5; Corporations, 5, 6, 7, 13; Damages, 2; Guardian and Ward, 1; Life Insurance, 3, 4, 6, 7, 15; Master and Servant, 1, 8; Mortgages, 2; Negligence, 1, 2, 5, 6, 7, 8, 9, 10, 11; Real Estate Broker, 4; Trial Practice, 4.**

1. **Hearsay: Depositions Taken Before Coroner.** Depositions of witnesses before a coroner are not admissible in evidence in litigation subsequently arising, touching the subject-matter of the coroner's inquest, unless expressly authorized by statute. *Queatham v. Modern Woodmen*, 34.
2. **Same: Admissible to Impeach.** Depositions of witnesses before the coroner may be used for the purpose of contradicting witnesses giving testimony in subsequent litigation touching the same subject-matter. *Ib.*
3. **Same: Statutes.** Section 6642, Revised Statutes 1899, providing that the evidence of witnesses before the coroner shall be preserved in writing, and shall in a specified case be returned to the court of the county having criminal jurisdiction, does not make depositions of witnesses before the coroner admissible in evidence to establish the cause of death in any case. *Ib.*
4. **Judicial Records: Conclusiveness.** Records of courts of competent jurisdiction are conclusive between the parties and privies, and, as a general rule, they import absolute verity. *Ib.*
5. **Coroner's Inquest: Admissibility of Verdict.** No provision of our statute authorizes the reception of a coroner's verdict in evidence in civil litigation arising out of the subject-matter of the inquiry, for the purpose of proving the cause of death. *Ib.*

**EVIDENCE—Continued.**

6. **Tort Actions: Malice and Wantonness Shown: Pecuniary Circumstances of Defendant May be Shown: Damages.** In an action of tort, accompanied with circumstances of malice, wantonness, etc., it is competent to show the financial standing of defendant, to the end of meeting out a proper punishment. *Schafer v. Ostmann*, 645.
7. **Admissions: Compromise.** Evidence relating to a compromise of a disputed claim is not competent as an admission by a party thereto against interest. *Bauer v. Implement Co.*, 653.

**EXECUTORS AND ADMINISTRATORS. See Mandamus, 2.**

1. **Detaining Property: Personally Liable, When.** An executor or administrator is personally responsible for property he detains from a claimant as an asset of the estate of the deceased, with knowledge that it did not belong to decedent, but to claimant. *White v. McFarland*, 338.
2. **Replevin: Detaining Property.** It has never been pointedly held in this State that under no circumstances will replevin lie against an administrator, and as circumstances may occur where it should lie, the court inclines to the view it will lie when such conditions obtain. *Ib.*
3. **Same: Detinue.** The remedy of replevin has largely displaced the old remedy by detinue, and the latter remedy would lie against an executor or administrator, if the property had been detained by his decedent and had passed into his hands upon the latter's death. *Ib.*
4. **Action Against, in Representative Capacity: Pleading: Petition Construed.** A petition in replevin which described defendant as executrix, and which alleged the death of decedent, the granting of letters testamentary to defendant, and her qualifying as executrix and acting as such, and which alleged plaintiff's ownership of the property in controversy, and defendant's refusal to surrender the same on demand, when considered in connection with the summons directed against defendant as executrix, stated a cause of action against defendant as executrix, and not an action against her individually. *Ib.*
5. **Final Settlement: Final Discharge: Powers of Administrator.** An administrator's power ceases after final settlement, pursuant to due notice and approval thereof, accompanied by an order of discharge, so that he cannot thereafter sue as administrator on a demand due the estate, though if the final settlement was approved without an order of discharge, he is still under the control of the probate court, and may sue for the estate. *Ewing v. Parrish*, 492.
6. **Same: Right to Sue for Newly Discovered Assets.** Though the judgment of the probate court, on the final settlement of an administrator, provided that the filing of receipts from the distributees should be in full discharge of all funds held by him, where no receipts were filed because the distributees contested the settlement, the administrator continued to be such so as to authorize him to sue to recover assets of which he had no knowledge at the time of settlement. *Ib.*

**EXECUTORS AND ADMINISTRATORS—Continued.**

7. **Assets of Estate: Failure to Inventory.** If notes belonged to an estate, their proceeds did not cease to be assets because they were not inventoried or accounted for in the administrator's final settlement, or because the probate court charged him with a note for which they were substituted. *Ewing v. Parish*, 492.
8. **Refusal to Appoint: Not Appealable Order: Mandamus Proper Remedy.** An order refusing to appoint a person administrator of an estate is not appealable, but the remedy is by mandamus to compel the court to issue letters of administration to him. *State ex rel. v. Reddish*, 715.
9. **Who Entitled to be Appointed: Discretion of Probate Court.** The general rule that sections 7, 9, Revised Statutes 1899, prescribing the order in which persons have the right to administer estates, must be observed in granting letters of administration, is not so rigid as to preclude the probate court from passing over a person entitled to letters in the statutory order of precedence, where the one passed over is unfit to administer the estate and where to appoint him would subject the assets of the estate to unusual hazard. *Ib.*
10. **Revoking Letters: Judicial Act.** Passing on a complaint filed in the probate court to revoke letters testamentary or of administration is a judicial act. *Ib.*
11. **Appointment of Administrator: Judicial Act: Probate Court May Exercise Discretion.** Section 42, Revised Statutes 1899, authorizing the probate court to revoke letters testamentary, is *in pari materia* with sections regulating the appointment of administrators, and the several sections should be construed together, and thus construed the probate court, when acting under them, acts judicially and may exercise its discretion in the matter of appointing an administrator; and hence it may decline to appoint a son of an intestate as administrator, where the interests of the estate conflict with the interests of the estate of the son's mother of which he is administrator. *Ib.*

**FRAUD AND DECEIT.** See Sales, 2, 3; Trial Practice, 7.

**Contracts: Defense not Available to Stranger to Contract.** In an action of replevin, where plaintiff claims title through a contract made by him with a third person, a defense that the contract was procured through fraud practiced on said third person by plaintiff is not available to defendant, since said third person, and not defendant, was the proper party to assail the contract on that ground. *Bauer v. Implement Co.*, 652.

**GUARDIAN AND WARD.**

1. **Evidence: Admissions by Guardian.** Generally, a guardian may not make an admission contrary to the interest of his ward, and, as against an infant, everything must be proved. *Queatham v. Modern Woodmen*, 34.
2. **Removal of Guardian: Probate Courts: Exclusive Jurisdiction.** Under the provisions of sections 3480, 3481 and 3482, Revised Statutes 1899, and section 34, article 6 of the Consti-

## GUARDIAN AND WARD—Continued.

tution, the power of appointment and removal of guardians and curators of minors is vested solely in the probate court. *Brewer v. Cary*, 193.

3. **Powers of Guardian: Education and Religious Training of Ward.** The determination of matters of education of the ward, both secular and religious, is committed to the guardian, natural or appointed. *Ib.*
4. **Same: Statutes.** The State does interfere, however, by requiring, under section 3494, Revised Statutes 1899, that the guardian appointed by the probate court shall not be "a person of religious persuasion, different from that of the parent, or of the surviving parent of the minor, if another suitable person can be procured, unless the minor, being of proper age, should so choose," which amounts to a legislative declaration that the religious as well as the secular education of the minor is to be committed to the person who is appointed guardian. *Ib.*
5. **Unfitness of Guardian: Removal.** If the guardian, or even the parent, is an unfit person, the remedy provided by statute is to institute proceedings in the probate court for his removal. *Ib.*
6. **Removal of Guardian: Directing Religious Training of Ward: Circuit Courts Have no Such Jurisdiction.** The circuit court on its equity side has no jurisdiction to remove a father as natural guardian because of a breach of an ante-nuptial contract providing that the offspring should be brought up in the Catholic Faith, nor to direct the father, as natural guardian, to bring up the offspring of said union in that faith, since the probate court has exclusive original jurisdiction in all matters relating to the appointment and removal of guardians. *Ib.*
7. **Final Settlement: Conclusiveness.** To disturb the force of a final settlement of a guardian's account, it must be attacked directly, and not collaterally. *Ackermann v. Haumuel-ler*.
8. **Same: Collateral Attack.** An action by a ward against the administrator of the deceased guardian for services rendered the guardian during the continuance of the relation is a collateral attack on the final settlement of the guardian, and the judgment in that proceeding is conclusive as to all matters which the probate court might have passed upon therein. *Ib.*
9. **Same: Charge for Services Rendered Guardian by Ward.** Services of a ward rendered to a guardian are assets of the guardianship, claims for which may be adjudicated in the proceedings for the final settlement of the guardians accounts. *Ib.*
10. **Final Settlement: Conclusiveness: Collateral Attack.** Where the claim of a ward for wages received while working for others and turned over to the guardian was not included in the final settlement of the guardian, the judgment approving the settlement must be attacked directly, and not collaterally as by an action by the ward against the administrator of the deceased guardian. *Ackermann v. Haumueller*, 427.

**HABEAS CORPUS.** See *Infants*, 1, 2.

**HARMLESS ERROR.** See *Assault and Battery*, 2; *Damages*, 2; *Municipal Corporations*, 3, 4.

**HUSBAND AND WIFE.**

1. **Ante-nuptial Contract for Religious Training of Children: Not Property Right.** Under an ante-nuptial contract providing that the wife would have the right to bring up the offspring in the Catholic Faith, the right of the wife is not a property right that would pass to and be enforceable by her personal representative at her death. *Brewer v. Cary*, 194.
2. **Same: Specific Performance.** An ante-nuptial contract, providing that the children should be brought up in the Catholic Faith even if the wife should die, cannot, after her death, be specifically enforced, since no property rights are involved. *Ib.*
3. **Same: Public Policy: Specific Performance.** An ante-nuptial contract, providing that the offspring should be brought up in the Catholic Faith even if the wife should die, is not, after her death, an enforceable contract against the husband, since public policy forbids the permanent transfer of the natural rights of a parent. *Ib.*
4. **Same: Moral Duty: Specific Performance.** An ante-nuptial contract, providing that the offspring should be brought up in the Catholic Faith even if the wife should die, cannot be specifically enforced, since only a moral duty is involved, which is not ground of equitable jurisdiction. *Ib.*
5. **Same: Welfare of Child: Specific Performance.** An ante-nuptial contract, providing the offspring should be brought up in the Catholic Faith, even if the wife should die, is not enforceable in equity on the ground that the court would look to the welfare of the child, since that would result in determining between religions, which the court will not do. *Ib.*
6. **Wife's Separate Property: Contract to Pay Judgment: Construction.** Where a husband and wife deposited funds with a trust company to secure purchasers of land against outstanding judgments against the depositors, the fact that said land belonged to the wife, while one of the judgments referred to in the agreement of deposit was against the husband alone, would not affect the right of the owner of such judgment to recover a sufficient amount under the agreement to pay his judgment, if valid and otherwise unpaid, since by that contract the wife made herself responsible for the payments of the judgments mentioned in it. *O'Connell v. Transit Co.*, 417.

**INFANTS.**

1. **Habeas Corpus: Welfare of Child.** In a proceeding by habeas corpus for the custody of a child, the welfare of the child itself invariably determines the matter, and not the naked question of right of custody in either parent or in the appointed guardian. *Brewer v. Cary*, 193.

**INFANTS—Continued.**

2. **Same: Powers of Court: Removal of Guardian.** In cases arising under the Habeas Corpus Act, the court having regard to the welfare of the child, will remit or commit its custody to one or the other of the parties before it in that proceeding, but it will not attempt to appoint or remove a guardian or curator, or a parent from the guardianship of the child, leaving that to the probate court; nor will it direct the guardian as to matters of teaching or training of the ward. *Brewer v. Cary*, 193.
3. **Suits by: Necessity of Appointing Next Friend: Parties.** Where an ante-nuptial contract provided that the father would bring up the children of the union in the Catholic Faith even if the wife should die, at the death of the wife, her father who was not appointed as a next friend, under sections 550, 551, and 553, Revised Statutes 1899, had no standing to seek to compel performances of the contract in behalf of the infant children of the union, who were under fourteen years of age, since the statutes provide the only way in which an infant can sue. *Ib.*

**INJUNCTIONS. See Justices' Courts, 3.**

1. **Staying Proceedings: Operates on Parties and not on Court.** An injunction granted to stay proceedings in a court of law does not operate as a restraint on such court in the exercise of its jurisdiction, but operates upon the parties to the action or ministerial officers of the court. *Ostmann v. Frey*, 284.
2. **Same: Judge Will not be Restrained.** An injunction will not be awarded to restrain a judge in the exercise of judicial functions. *Ib.*
3. **Staying Proceedings: Adequate Remedy of Law.** An injunction to restrain a sale under an execution issuing from a court or on a judgment given without jurisdiction will not be awarded, for the reason an adequate remedy at law exists in such instances, which may afford complete relief. *Ib.*
4. **Same: Replevin.** An injunction will not lie to restrain further proceedings by a constable on an execution levied by him, though the execution was issued after the judgment was suspended by a perfected appeal and the levy was under such circumstances that the constable would not be liable for damages; there being an adequate remedy at law, by replevin for the property. *Ib.*

**INSTRUCTION. See Appellate Practice, 11; Assault and Battery, 8, 10, 11; Attorney and Client, 5; Banks, 3; Master and Servant, 2, 10, 11, 18; Municipal Corporations, 3, 4; Negligence, 9; Replevin, 2; Sales, 5, 7; Trial Practice, 7.**

1. **Ignoring Facts.** An instruction which ignores a concession of the fact made by the party requesting it is properly refused. *Lucks v. Bank*, 376.
2. **Refusal: Not Relevant to Issues.** An instruction, not relevant to any issue raised is properly refused. *Dean v. Railroad*, 429.

**INTERSTATE COMMERCE. See Common Carriers, 3.**



## INTOXICATING LIQUORS.

1. **Storing: Acts Constituting Offence.** Laws 1907, p. 231, section 2, prohibiting the storage of intoxicants for another person in local option counties, does not prevent the storage of beer by one as agent for a brewery company, where it is not received for use or sale in the county. *State v. Boehler*, 614.
2. **Same: Agent of Brewery: Indictments and Information: Necessity of Stating Whether Principal is Corporation or Partnership.** An information under Laws 1907, p. 231, section 2, charging an unlawful storage of intoxicants as agent for the "P. & G. Brewing Company," is invalid for failing to aver whether the company was a corporation or a partnership. *Ib.*

JUDGMENTS. See *Justices' Courts*, §; *Limitation*.

1. **Conclusiveness.** A judgment entry must be taken to express the true ruling of the court. *Thompson v. Paddock*, 145.
2. **Default: Irregularities: Setting Aside.** Where an action of replevin is against an executrix in her representative capacity, a default judgment for the value of the property, rendered against her personally, is irregular, if not void, and may be set aside on application therefor within the statutory period. *White v. McFarland*, 338.
3. **Default: Relief Granted Limited by Petition.** Where a defendant defaults, the relief granted against him may not be greater than that demanded in the petition; and where a defendant fails to answer a petition against him in a representative capacity a personal judgment may not be rendered against him. *Ib.*
4. **Res Judicata: Pleading.** A plea of *res judicata*, which does not plead a final judgment, but one merely of dismissal and for costs, is insufficient. *Dean v. Railroad*, 429.
5. **Same: Nonsuit.** A judgment of nonsuit, taken either voluntarily or by the action of the court, is a mere dismissal of the cause, and not a judgment that can be pleaded in bar of any subsequent action between the same parties on the same subject-matter. *Ib.*
6. **Scire Facias: Exclusive Remedy.** *Scire facias* is the only mode of reviving a judgment. *Bick v. Dixon*, 703.

## JUDICIAL SALES.

1. **Title of Purchaser.** In the absence of fraud, surprise, or misunderstanding, the purchaser at an execution sale takes the title sold at his peril. *Clarke v. Cooper*, 230.
2. **Advertisements: Description of Premises: Corner Lot.** A statement in an advertisement for the sale of a lot under an execution that it was a corner lot was no part of the description. *Ib.*
3. **Notice of Sale: Description of Property: Mis-Recital in Advertisement: "Corner Lot."** The advertisement of a lot sold at execution sale stated that it was a corner lot on Grundy street, and the deed tendered the purchaser conformed to the levy and advertisement, but the lot was not in fact a corner lot. 148 App.—49.

**JUDICIAL SALES—Continued.**

There was a point on a certain survey of the subdivision which was designated Grundy street, and it could have easily been determined by slight investigation whether the street was opened or dedicated, and the lot could have been located. The purchaser lived within five or six blocks of the lot, and was familiar with the neighborhood, and had passed the lot sold, but claimed that he relied upon the statement in the advertisement that it was a corner lot, and was misled thereby into bidding a higher price than it was worth as a non-corner lot. *Held*, that the purchaser could not rely on the misstatement in the advertisement and deed that the lot was a corner lot to avoid the sale or justify his refusal to accept the lot. *Clarke v. Cooper*, 230.

4. **Mistake of Purchaser as to Value.** A failure or mistake in value of the thing purchased at a judicial sale is not ground for setting it aside. *Ib.*

**JURISDICTION.** See Attachment, 1; Guardian and Ward, 2; Venue.

1. **Exclusive Jurisdiction: Courts.** Where the Constitution and statutes have by specific provisions conferred jurisdiction in particular matters on certain designated courts, thus clearly indicating that such jurisdiction is in those courts exclusively, it is not within the power of any other court, whether of law or equity, to assume such jurisdiction. *Brewer v. Cary*, 193.
2. **Supreme Court: Title to Land: Question Involving Construction of Homestead Laws.** Where the point of law in issue is whether, under the Homestead Statutes of 1895, the heirs of a deceased took the homestead in fee, free from the demands of creditors of decedent, or whether it was subject to be sold for his debts, a question of title to real estate is involved, and hence the Supreme Court has jurisdiction of the appeal. *In re Estate William Street v. McCune*, 700.
3. **Over Person: Lack of, Waived by Appearance.** Where the suit as to the defendant served in the county was dismissed, the remaining defendant who was served outside the county waived the right to question jurisdiction over him by subsequently appearing, pleading, and participating in the trial on the merits. *Reifschneider v. Beck*, 726.

**JURY QUESTION.** See Common Carriers, 27; Livery Stable Keepers, 1; Master and Servant, 23, 24; Trial Practice, 4.

**JUSTICES' COURTS.** See Limitation; Prohibition, 4, 6, 8.

1. **Pleading: Account Stated.** The rule requiring an allegation of defendant's promise to pay the balance found due, in an action on an account stated, does not apply in actions before a justice of the peace, where formal pleadings are not required. *Loan, Storage & Mercantile Co. v. Farbstein*, 216.
2. **Powers: Quashing Writs.** A justice of the peace has no power to either recall or quash an execution issued by him. *Ostmann v. Frey*, 272.
3. **Restraining Execution: Injunctions.** An injunction will not lie to restrain a justice of the peace issuing an execution, his act in doing so being judicial. *Ostmann v. Frey*, 284.

## JUSTICES' COURTS—Continued.

4. **Appeal to Circuit Court: Failure of Appellant to Appear for Trial: Summary Affirmance of Judgment.** Under section 1557, Revised Statutes 1899, authorizing the court on appeal from a justice to affirm the judgment on the failure of appellant to prosecute the appeal, a defendant who perfected his appeal and served on plaintiff a proper notice ten days before the first day of the next term of the circuit court, but who failed to appear on the day the case was properly set for trial, failed to prosecute the appeal, and the court could affirm the judgment, though the plaintiff did not comply with section 4075, which applies only where appellant omits to give notice of his appeal. *Sigaloff v. Breweries Cos.*, 452.
5. **Judgments: Transcript Filed in Circuit Court: Limitation.** Though section 4019, Revised Statutes 1899, gives a justice's judgment many of the attributes of a judgment of the circuit court, when the transcript is filed in the office of the circuit clerk, and such court may modify it, the judgment remains that of the justice, and not that of a court of record, as regards the limitation period within which an action on it will lie. *Chittenden v. Graves*, 537.

## LANDLORD AND TENANT.

1. **Agreement for Lease: Statute: Construction.** The Landlord and Tenant Statute, section 4110, Revised Statutes 1899, providing that all contracts or agreements for the leasing, etc., of stores, houses, etc., not made in writing, signed by the parties thereto, etc., shall be held to be tenancies from month to month, etc., does not raise a monthly tenancy out of an agreement to demise premises for a definite term by a written contract, when the contract is never executed; the statute being intended to operate on all oral lease contracts, no matter for what period, and convert them into monthly tenancies. *Peck v. Dunnevant*, 69.
2. **Same: Creation of Tenancy.** Where a verbal agreement was made to demise premises for a definite term by a written contract, but the written contract was never executed, the relationship of landlord and tenant did not exist by virtue of the verbal agreement, and in default of the contract that relationship would not be implied by law until the proposed tenant took possession, thereby signifying a purpose to become a tenant. *Ib.*
3. **Same: Action for Rent Will Not Lie.** In such a case, an action for rent under section 4110, Revised Statutes 1899, will not lie, as the relationship of landlord and tenant does not exist; the aggrieved party being left to his ordinary remedy for damages at law, or whatever remedy he may have in equity. *Ib.*

## LIBEL AND SLANDER.

1. **Corporations: Right of Action by.** While, where a publication is a libel on the individual members of a corporation, but not on the corporation, the latter cannot recover therefor, unless it suffers special damage, yet a corporation may maintain an action for damages caused by a libel affecting its pecuniary interests by reflecting on its solvency, the honesty of its management, or the quality of its products. *Bank v. Goodwin*, 364.

**LIBEL AND SLANDER—Continued.**

2. **Same: Libel of Bank: Charge of Misappropriation of Funds by Officers.** A published statement that a fraud order was issued against plaintiff bank by the Postmaster-General, for the reasons that sales of its stock had been made and deposits induced upon false representations and that the funds of the institution were being misapplied, meant that plaintiff's managing officers, acting for the corporation, were applying its funds to illegal purposes, and not that the officers acting as individuals were doing so, and hence was actionable as a libel against the bank, without averment of special damages. *Bank v. Goodwin*, 364.
3. **Same: Charging Misconduct by Officers.** An accusation of misconduct on the part of corporate officers, acting as and for the corporation, which discredits its solvency or impairs its business is a libel on the corporation, and is actionable by it without averment of special damage. *Ib.*
4. **Same: Libel of Bank: Fraud Order Issued by Postmaster-General.** If defendant stated in writing that the reason why the Postmaster-General issued a fraud order against the plaintiff bank was because its funds were being misapplied, when the Postmaster-General gave no reason for issuing the order, defendant is liable in an action against it by the bank for libel. *Ib.*
5. **Same: Privileged Matter.** The Postmaster-General, being a high official of the National Government whose acts as such are of interest to the general public, a fair publication, made as a matter of news or public concern and without actual malice, of what such an officer does officially and the reasons he gives for his acts is privileged. *Ib.*
6. **Slander of Title: Written Words.** "Slander of Title" differs from slander of person in that it may be the result of written as well as of spoken words. *Rhoades v. Bugg*, 707.
7. **Same: Language Necessary to Constitute Defamation.** There must be a defamation of title by language before an action for slander will lie; so that where defendant maliciously asserted title to ground by driving stakes in it, when he knew he had no title, for the purpose of preventing plaintiff from selling, and succeeded in accomplishing that purpose, an action for slander of title will not lie. *Ib.*
8. **Same: Changing Theory: Trespass on the Case: Pleading.** Where an action was plainly one of slander of title, on failing to prove the slander, plaintiff could not recover as in trespass on the case. *Ib.*

**LIFE INSURANCE. See Replevin, 1, 2.**

1. **Fraternal Beneficiary Association: Engaging in Forbidden Occupation by Insured.** In an action on a certificate of insurance issued by a fraternal beneficiary association, where the evidence is conclusive that at the time of his death insured was engaged in an occupation prohibited by the express terms of the contract of insurance, if it be further shown that his death was directly traceable to such employment, no liability obtains against the insurer. *Queatham v. Modern Woodmen*, 33.

## LIFE INSURANCE—Continued.

2. **Same: Cause of Death: Burden of Proof.** A fraternal beneficiary association, seeking to defeat recovery on a certificate of insurance on the ground the member died while engaged in a prohibited occupation, has the burden of showing the member came to his death as a direct result thereof. *Queatham v. Modern Woodmen*, 33.
3. **Same: Evidence: Proofs of Death: Admissions.** Proofs of death furnished by a beneficiary in a life policy to insurer, in accordance with the policy, are admissible in evidence against the beneficiary as admissions of the truth of the statements therein contained, but the admissions are only prima-facie true, and may be explained on the trial. *Ib.*
4. **Fraternal Beneficiary Association: Guardian and Ward: Evidence: Admission by Guardian: Proofs of Death.** A guardian furnishing proofs of death of one insured in a life policy, payable to his infant wards, may not bind the wards by admissions beyond the actual requirements of the policy, and where the cause of death need not be stated in the proofs, and the coroner's inquest need not be furnished therewith, the act of the guardian in stating the cause of death in the proofs of death, and in furnishing therewith the coroner's inquest, is not binding on the infant beneficiaries. *Ib.*
5. **Proof of Death: Requirements: Stating Cause of Death.** A mutual benefit certificate, stipulating that no action may be maintained thereon, until proofs of death and of claimant's rights to benefits have been filed and passed on by the officers of the association, does not impose the duty to recite in the proofs of death the cause of death. *Ib.*
6. **Fraternal Beneficiary Association: Evidence: Coroner's Inquest: Admissibility of Verdict.** In an action on a mutual benefit certificate, the coroner's verdict is competent evidence as part of the proof of the death of insured, but it is not prima-facie competent as tending to prove the cause of such death, and this is true no matter by which party it is introduced. *Ib.*
7. **Same: Engaging in Forbidden Occupation by Insured: Cause of Death: Sufficiency of Evidence.** In an action on a mutual benefit certificate, stipulating that there shall be no recovery if the death of the member occurred as a direct result of following a prohibited occupation evidence *held* not to show that the member came to his death as a direct result of engaging in a prohibited occupation. *Ib.*
8. **Action on Policy: Interpleaders.** Where a benefit order, sued on a certificate by the beneficiary named therein, pleaded that the member attempted to change the beneficiary by making the certificate payable to his minor children instead of his wife, and asked that the wife be named as beneficiary in the original certificate and the curator of the children interpleaded, and the wife averred that at the time of the attempted change the member was not of sound mind, and the curator claimed the certificate by virtue of the attempted change of beneficiaries, the cause became a suit in equity, and the controversy should be determined according to equitable principles. *Walsh v. Trust Co.*, 179.
9. **Fraternal Beneficiary Association: Change of Beneficiary: Non-conformity to Rules.** The rules of a beneficiary order required

**LIFE INSURANCE—Continued.**

that the name of the beneficiary should be given in every benefit certificate issued, and that if the member desired to change the beneficiary he could do so by forwarding to the sovereign camp his certificate with a request written thereon, giving the name of the new beneficiary. A member, who did not have the certificate, executed an instrument asking for a change of beneficiaries so as to make the certificate payable to his children, instead of to his wife, and asking for a new certificate. The instrument was sent to the sovereign camp, and it returned the same with the statement that it was necessary that the request for a change of beneficiaries should be filled out on the official blank of the order, a copy of which was inclosed. The member died before the instrument from the sovereign camp was received. *Held*, (1) That while the form in which the change of beneficiaries was attempted to be made was not strictly in accordance with the rules of the order, it was substantially as required by them; (2) That equity, as between the original and new beneficiaries, will enforce the intent of the member to make the change of beneficiaries, though death intervened before he could conform to the rules, and formally express his intention. *Walsh v. Trust Co.*, 179.

10. **Same: Failure of Order to Object.** The failure of a fraternal beneficiary association to insist on the form required by its rules and by-laws for a change of beneficiaries does not bind parties claiming under the rules of the order. *Ib.*
11. **Assignment of Policy: Subject to "Facility Clause" of Policy.** Under an assignment by insured of a policy of life insurance, payable to insured's executors, administrators or assigns, and containing a "facility of payment clause" to the effect the company might make any payments provided for in the policy to any relative of insured, or to any person appearing to the company to be equitably entitled to the same by reason of having incurred expenses in any way on behalf of insured for his burial, which assignment on its face was made subject to the terms and conditions of said clause, the assignee's interest was subject to the right of the company to pay the amount of the policy to any person appearing to it to be equitably entitled to the same, by reason of having incurred expenses on behalf of insured for his burial, as provided in said clause. *Kelly v. Insurance Co.*, 249.
12. **Same: Payment to Administrator for Burial Expenses.** Insurer in a life policy authorizing it to pay the policy to any person equitably entitled thereto, by reason of having incurred expenses in behalf of insured for his burial or other purposes may pay the policy to the public administrator who had taken charge of the estate of deceased and incurred expenses for his burial, whether he did so before or after the receipt of the money due on the policy. *Ib.*
13. **Who May be Assignee.** One taking out a policy on his life payable to his executors, administrators, or assigns may assign it to any one standing in the position of creditor or dependent, and the assignee need not be a relative. *Ib.*
14. **Industrial Policy: Facility Clause: Validity.** The facility clause of an industrial life policy, providing that on the death of insured prior to a specified date the amount due may be paid to either the beneficiary named or to the executor or administrator,

**LIFE INSURANCE—Continued.**

husband or wife or any blood relative of insured, and that the production of a receipt signed by either of them shall be conclusive evidence of payment, is valid, and where insurer has paid the amount of the policy to one of the enumerated persons who owned the policy and surrendered it, another of the persons enumerated can not compel payment. *Renfro v. Insurance Co.*, 258.

15. **Industrial Policy: Ambiguity in Designating Beneficiary: Parol Evidence Competent to Explain Evidence.** The word "estate" in an industrial life policy naming the "estate" of insured as the beneficiary and providing for the payment on the death of insured before a designated date of the amount due to either the beneficiary or the executor or administrator, husband or wife, or any relative by blood of insured is ambiguous, and parol evidence that the agent of insurer at the time he procured the application for the policy informed insured that her only child would be paid the policy, is admissible to show the child's rights, and the child in possession of the policy at the time of insured's death, may compel payment thereon. *Ib.*
16. **Same: Construction.** Industrial life policies will be treated by the courts as highly benevolent, and they will not be construed as intending to provide a fund for the benefit of creditors of insured, unless that is distinctly set out in the policy itself. *Ib.*
17. **Same: Vexatious Refusal of Payment by Insurer.** Where insurer in an industrial policy designating the estate of insured as a beneficiary refused to pay on insured's death the amount of the policy to the only child of insured, the court awarding judgment in favor of the child should not impose the damages prescribed by section 8012, Revised Statutes 1899, for insurer had the right to take the judgment of the court as to its liability, that question never having been directly before an appellate court of this State. *Ib.*
18. **Policy and Premium Notes Constitute One Transaction.** Where a policy of life insurance and notes given for the premium are executed simultaneously and the latter refer to the former, they constitute one transaction. *Marshall v. Life Insurance Co.*, 669.
19. **Same: Stipulations in Premium Notes.** It is competent for insurer and insured to enter into an arrangement for settlement of the first year's premium on a life insurance policy partly in cash and partly in notes containing certain terms and provisions, and in that event, as between the company and insured, there is no law preventing stipulations in such premium notes from being as much a part of the contract as those in the policy. *Ib.*
20. **Same: Forfeiture for Non-Payment: Construction of Notes and Policy.** Notes in part payment of a first premium which stipulated that the policy should become void on failure to pay the same at maturity, and which were contemporaneous with the policy and were taken by the vice-president before it was issued, and were accepted by the company, became binding on both it and insured, notwithstanding a clause in the policy declaring it and the application should constitute the entire contract, the meaning to be attributed to that clause, in order to harmonize it with the other stipulations, and especially those

**LIFE INSURANCE—Continued.**

in the notes, being that future alterations of the contract were prohibited save in the mode prescribed. *Marshall v. Life Insurance Co.*, 669.

21. **Same: Repugnancy.** There is no essential repugnancy between a note given for part of the first premium of a life insurance policy, which provided that failure to pay it at maturity would render the policy void, and the provision of the policy itself, which recited it was granted in payment of a certain amount, being the premium for the first year, and the annual payment of the same sum each year thereafter for a certain period; that it should be incontestible after one year from its date provided premiums were duly paid; that, after it had been in force for one year, a grace of one month would be allowed in the payment of premiums; that after three annual premiums were paid if the policy remained in force the company would make a certain loan thereon; and that it would give insured an option in a table of loan values, nothing, however, being said about notes being given for premiums. And where an insured failed to pay such a note and the amount paid by him in cash was not sufficient to keep the policy in force to the date of his death, the beneficiary was not entitled to recover. *Ib.*
22. **Same: Effect of Insurer's Attempt to Collect Notes.** Forfeiture of life insurance for non-payment of premium notes given in part payment of the first year's premium was not waived because the company tried to collect them when due, as the notes stipulated the contract should stand annulled if they were not paid and the full amount of the premiums should be considered as having been earned by the policy remaining in force during the period previous to the default. *Ib.*

**LIMITATION. See Justices' Courts, 5.**

**Justices' Courts: Judgments: Barred in Five Years.** An action on a justice's judgment is barred after five years. *Chittenden v. Graves*, 537.

**LIVERY STABLE KEEPERS.**

1. **Contract to Transport: Action for Breach: Question for Jury: Facts Stated.** Where a livery stable keeper agreed to transport a sick person from a hospital to her home and after carrying her to within a few blocks of her home refused to complete the journey on account of bad roads, but offered to take her back to the hospital or to a barn where another conveyance could be obtained to complete the journey, it was for the jury to determine whether the contract was breached and whether the passenger waived her rights by refusing these offers, in view of the fact that a surrey was driven over the roads without difficulty and that her physical condition was such that it was impossible for her to endure the strain incident to an acceptance of either alternative. *Trout v. Livery and Undertaking Co.*, 621.
2. **Same: Right of Passenger to Recover Fare Paid.** And where, in such a case, the liveryman retains the compensation paid for carriage, the passenger is entitled to recover it, unless she waives her right to have the contract performed. *Ib.*
3. **Same: Pleading: Petition Held to State Cause of Action Ex Contractu.** In an action against a livery stable keeper, plain-



## LIVERY STABLE KEEPERS—Continued.

tiff alleged that while she was a patient at a hospital, she contracted with defendant, a livery stable keeper, to carry her to her home for an agreed consideration which was paid by her, and that after carrying her to within five or six blocks of her home, defendant refused to carry her further; that by defendant's failure to carry out his contract, plaintiff became sick and has suffered and will suffer great pain of body and mind, and has incurred large expense for medical service and nursing, all to her damage in a sum stated, and prayed for a judgment in a specified sum for actual damages, for the amount paid defendant for transportation, and for a further specified sum as punitive damages. *Held*, that the petition counted entirely on the breach of a contract of carriage, and not on an obligation imposed by law, and that the prayer for punitive damages should be disregarded. *Trout v. Livery and Undertaking Co.*, 621.

4. **Not Common Carriers.** A company engaged in the livery business, which does not hold itself out to serve any and all persons, but operates only under a special contract, and deals with such persons only as it chooses, is in no sense a common carrier. *Ib.*
5. **Degree of Care Required to Use.** A liveryman is not under the obligation to use the same degree of care which a common carrier is obliged to use, but he is only required to conduct his calling with the same degree of care and circumspection which is exercised by prudent persons engaged in the same business, and is answerable only for a breach of the slightest obligation which the law imposes upon every person who accepts a human being in bailment, which is the obligation of ordinary care. *Ib.*
6. **Sick Passengers: Degree of Care Liveryman Required to Use.** The high degree of care required of a common carrier in the transportation of a sick passenger is not required from a liveryman in transporting such a passenger, but his obligation is to exercise ordinary care. *Ib.*
7. **Same: Injury to Passenger by Breach of Duty: Damages: Elements of.** Where a livery stable keeper breaches a contract for the transportation of a sick passenger, he is liable only for such damages as are the natural and proximate result of the breach, but these damages include not only those which are direct, but such as the parties should have reasonably contemplated would be likely to result from a breach when the contract was made, and where the liveryman knew the passenger was sick, he will be liable for damages caused by unnecessary delay and exposure to inclement weather, resulting from his breach of his contract to transport the passenger. *Ib.*
8. **Same: Action Contractu or Ex Delicto: Form of Action: Immaterial.** The obligation of a liveryman to use ordinary care in the transportation of a passenger is not enjoined by law, but is an implied term in his contract, and in a suit for damages, caused by failure to perform his contract, he may be held responsible for failure to use ordinary care, whether the action be *ex contractu* or *ex delicto*. *Ib.*
9. **Same: Action Ex Contractu: Contributory Negligence of Passenger.** A person who has hired a liveryman to carry him between two points in a city, and sues for damages for breach of the contract, cannot recover damages which might have been avoided but for his own contributory negligence, whether the suit is on the contract or in tort. *Ib.*

**LIVERY STABLE KEEPERS—Continued.**

10. **Same: Damages: Damages Held Not Too Remote: Facts Stated.** Plaintiff, while ill at a hospital, employed defendant, a livery stable keeper, to carry her to her home. Defendant was not informed that plaintiff was ill, but the driver in charge of the carriage saw on her entering the carriage that she was ill and very feeble. Defendant carried plaintiff to within five or six blocks of her home, and then because of the condition of the streets, refused to complete the journey. Plaintiff thereupon sent a message to a friend, who after a delay of an hour, or more, came after her with an open carriage. *Held*, that the damages resulting from plaintiff's catching cold because of defendant's breach of contract, and the expenditures occasioned thereby, were not too remote for recovery, whether the action was on the contract or in tort. *Trout v. Livery and Undertaking Co.*, 621.

**LOCAL OPTION ELECTION.** See *Justices' Courts*, 5.**MANDAMUS.** See *Executors and Administrators*, 8.

1. **Controlling Courts: Probate Court.** Mandamus lies only to control courts in the performance of ministerial acts, and does not lie to compel a probate court to set aside an order rendered while acting judicially. *State ex rel. v. Reddish*, 715.
2. **Executors and Administrators: Refusal to Appoint: Judicial Act.** The finding of a probate court, supported by evidence, that there was a conflict of interests between an estate of which the applicant was already administrator and the estate on which he sought to obtain letters, was judicial in its character, and the refusal of the court to grant letters to such applicant, for that reason cannot be altered by mandamus. *Ib.*

**MASTER AND SERVANT.**

1. **Injuries to Servant: Sufficiency of Evidence.** In an action by an employee for injuries sustained by falling over iron in leaving his place of work, evidence *held* to warrant a finding for plaintiff. *Strobel v. Manufacturing Co.*, 22.
2. **Same: Instruction.** In an action against the master by a servant for injuries received in falling over obstructions in the passageway leading from his place of work, an instruction that if the jury believed that on the day mentioned plaintiff was in the employ of the defendant company; that it was necessary for him, at the close of his day's labor, in order to leave the building, to pass through the finish room, that in passing through that room he used the only mode of egress provided by the defendant company for leaving the premises and that he was at the time exercising ordinary care for his own protection; that he slipped upon scraps of iron which were lying upon the floor of the rooms and thereby broke his knee; and that the presence of the scraps of iron upon the floor was caused by the failure on the part of defendant to exercise ordinary care in order to provide a reasonably safe place whereby the plaintiff could depart from said building, the verdict should be for the plaintiff, did not misdirect the jury and is *held* to be founded on the testimony. *Ib.*
3. **Same: Master's Duty: Ways.** A master is liable for injuries to a servant because of incumbered ways; his duty being to furnish a safe exit from the place of work, being akin to his duty to furnish a reasonably safe place to work. *Ib.*

## MASTER AND SERVANT—Continued.

4. **Injury to Servant: Fellow-Servant.** Where a foreman regularly assisted in cleaning brass plates, and it was part of his duties to do so, his act in letting a brass plate fall, whereby an employee who was assisting him in the work was injured, was the act of a fellow-servant for which the master was not liable. *Rogers v. Schiele*, 53.
5. **Same: Evidence Held Insufficient to Show Act Was in Performance of Duties as Foreman.** In an action for injuries to an employee, caused by the act of a foreman in letting a brass plate fall, evidence *held* insufficient to show that at the moment he let the plate fall he was exercising the duties of a foreman in directing employees some distance away. *Ib.*
6. **Injury to Servant: Safe Place to Work: Duty of Master.** A master must furnish his servant with a reasonably safe place in which to work, and he must exercise ordinary care to keep the place in a reasonably safe condition. The question of his negligence is determined by reference to the conduct of an ordinarily prudent person under like circumstances, and omissions which entail injuries such as might have been anticipated by a reasonably prudent person are negligent breaches of duty. *Halloran v. Pullman Co.*, 243.
7. **Negligence: Injury to Servant: Anticipating Result: Facts Stated.** A foreman in charge of car cleaners directed an upholsterer to repair a seat in the smoking room of a Pullman car. The upholsterer entered the car, which was dark, raised the sofa from the seat, and then rested it on his knee, and was about to put the stepping box under it when his right foot slipped, and the cushion fell, catching the forefinger of his right hand between the stepping box and the frame of the sofa, crushing his finger. The floor of the car was sloppy. *Held*, that the master was not liable, because a reasonably prudent man would not have supposed that the water remaining on the floor of the car would have caused an accident to any one employed in working there. *Ib.*
8. **Injury to Third Person by Servant: Evidence Held Sufficient to Show Servant's Authority.** In an action for personal injuries caused by the collision of plaintiff's buggy with defendant's automobile, driven by his chauffeur, evidence *held* to show that the chauffeur was acting under defendant's authority and within the scope of his employment when the accident occurred. *Winfrey v. Lazarus*, 388.
9. **Same: Liability of Master.** An employer is liable for damages caused by his employee's negligence while acting in the scope of his employment, though the negligent act was not necessary to the performance of his duties nor expressly authorized by or known to the employer. *Ib.*
10. **Same: Automobile Colliding With Buggy: Instructions: Instruction for Plaintiff Approved.** In an action for personal injuries caused by the collision of plaintiff's buggy with defendant's automobile, driven by his chauffeur, the court instructed that if plaintiff's buggy was run into by an automobile operated by one employed by defendant, who was then operating it in the course of his employment and who negligently operated it at a speed greater than was reasonable in view of the traffic and use of the highway, or so great as to endanger life and limb, and plaintiff's injury was directly due to his negligence, the jury should find for plaintiff. *Held*, the instruction was correct. *Ib.*

**MASTER AND SERVANT—Continued.**

11. **Same: Inconsistent Instructions.** An instruction that if the automobile was in the chauffeur's charge at the time of the accident but had been taken out by him at the request of defendant's married daughter, not a member of his household, for her own use, and not on defendant's business, the jury should find for defendant was not inconsistent with the previous instruction so as to warrant the conclusion that the jury disregarded it in finding for plaintiff. *Holloran v. Pullman Co.*, 243.
14. **Wrongful Act of Servant: Liability of Master.** In order to render the master liable for the wrongful act of servant, it is not essential the latter be specially authorized nor that the particular act complained of be necessary to the performance of his duties, but it will be sufficient if it appear that the agent was acting in the course of his employment, although outside of the master's instructions. *Bouillon v. Gas Light Co.*, 463.
13. **Same: Master Held Liable.** The agent of a gas company authorized to read gas meters was acting within the scope of his employment in entering plaintiff's part of the flat and attempting to open the door for the purpose of reading a meter, though the meter was in fact in a part of the building not occupied by her, so as to make the company liable for physical injuries to plaintiff from the agent's use of violent language in attempting to enter. *Ib.*
14. **Railroad's Negligence: Injury to Servant: Specific Negligence not Presumed from Uncoupling of Train.** In an action against a railroad company by a servant for personal injuries, evidence that a train upon which plaintiff was riding became uncoupled, causing a sudden and violent shock which threw plaintiff over, in no manner tends to support a specific charge that the engineer was so remiss in his duty as to occasion the uncoupling. *Gibler v. Railroad*, 475.
15. **Railroads: Negligence: Res Ipsa Loquitur: Fellow-Servants.** The mere fact that the plaintiff is a servant of the defendant will not prevent the application of the doctrine of *res ipsa loquitur* in an action for personal injuries against a railroad company by one of its employees, especially in view of section 2873, Revised Statutes 1899, which abrogates the doctrine of fellow-servants as to railroad employees. *Ib.*
16. **Same: Fellow-Servants: Who Are Within Statute.** One repairing bridges for a railroad company, if injured while in the line of duty, though not actually engaged in work on a bridge, is within the scope of section 2873, Revised Statutes 1899, abrogating the doctrine of fellow-servants as to railroad employees. *Ib.*
17. **Same: Res Ipsa Loquitur Applies to Facts Stated.** The uncoupling of a freight train while running at a rate of twenty or twenty-five miles an hour is such an unusual and extraordinary occurrence as to bespeak the want of due care on the part of defendant in some respect or somewhere; but it does not tend to prove negligence on the part of the engineer so as to sustain a specific averment of negligence on the part of the engineer, charged in the petition. *Ib.*
18. **Negligence: Injury to Servant: Defective Scaffold: Instructions: Assuming Facts.** In an action by a servant against the master for personal injuries received by the former, due to the break-

## MASTER AND SERVANT—Continued.

ing of a plank on a scaffold, on which he was working, an instruction which assumed defendant had provided and furnished the plank for use on the scaffold was erroneous as assuming that fact in the absence of any evidence to justify it. *Smith v. Light & Power Co.*, 572.

19. **Same: Defective Appliances: Liability of Master.** The master is liable for injury to a servant only when either actual knowledge of the defective tool or appliance causing the injury is brought home to him, or such facts are in evidence as warrant the jury in assuming he has or should have such knowledge. *Ib.*
20. **Same: Defective Scaffold: Master's Negligence not Shown: Facts Stated.** A steamfitter gang, of which plaintiff was a member, in the employ of defendant in the construction of a coal tower, was told by defendant's foreman to mount a certain scaffold, on which there was a platform consisting of six planks, and run some pipes, and when they finished there to go to another scaffold and run some pipes there. The steamfitters on going to the second scaffold and finding no platform on it, told the carpenters, who had already carried away four of the six planks from the first platform, to leave the other two. The steamfitters, in the absence of the foreman, without any direction having been given them as to what planks they should take or where they should get them, used these two planks, though there was plenty of material on the floor below that on which they were working, for the platform of the second scaffold, and one of the planks, which was cross-grained and contained a knot, broke when the plaintiff stepped on it. *Held*, there was no evidence that defendant furnished these particular planks to the steamfitters with which to build a platform on the second scaffold, and that plaintiff, without directions from defendant, having selected the defective plank, and knowledge of the defect not being brought home to defendant, plaintiff was not entitled to recover. *Ib.*
21. **Same: Contributory Negligence.** It being further shown that plaintiff selected the plank and used it without any examination as to its condition and that a slight inspection on his part would have shown him it was unsafe, it is *held*, that his injuries were caused by his own carelessness. *Ib.*
22. **Same: The first scaffold, from which the planks were taken, having three supports to rest upon, one of which was in the middle of the plank, and the second scaffold on which the plank rested when it broke, having only two supports, one at either end of the plank and none under the middle, it cannot be inferred that because the plank had been safely used on the one scaffold plaintiff was warranted in using it on the other, since when it broke plaintiff was standing near the middle of it, where there was the most strain and least support, whereas, on the other scaffold, it had been supported in the middle by a joist.** *Ib.*
23. **Same: Master's Negligence Question for Jury.** The direction of defendant's foreman to plaintiff and his companion steamfitter to use the standing scaffolds in performing their task of fitting steam pipes was an assurance by the master that they were reasonably safe for the purpose intended and that the boards on top of them, on which the servants were to stand

**MASTER AND SERVANT—Continued.**

and walk, were reasonably safe for that purpose, although the scaffold on which plaintiff was injured was not pointed out by the foreman, the board which broke, however, having been in use on the scaffold which was pointed out, and removed by plaintiff to the scaffold on which he received his injury; and hence it was for the jury to determine whether or not defendant was liable. *Smith v. Light & Power Co.*, 572.

24. **Same: Contributory Negligence Question for Jury.** Others having used the plank in the scaffold, an ordinarily prudent person would not have scanned it for defects as closely as he would on selecting it in the first instance, and it being rough on one side and discolored by use on the other so that the knot which occasioned its breaking was concealed and hence not likely to be discovered upon such an inspection as an ordinarily prudent workman would have made under the circumstances, plaintiff should not be adjudged guilty of contributory negligence as a matter of law. *Ib.*

**MECHANICS' LIENS.**

1. **Misdescription of Premises: Including Land of Another: Including Less Than One Acre.** Where a mechanic's lien statement described the land on which the building was constructed and also adjoining land belonging to another which was not subject to the lien it was not fatally defective, but was enforceable as to the parcel containing the improvement, its metes and bounds being clearly established by the proof; and the fact that the parcel would not include one acre could prejudice no one but plaintiff. *Manufacturing & Supply Co. v. Sunkel*, 136.
2. **Same: Right to Lien on Improvement.** A mechanic's lien claimant who has misdescribed the ground on which the improvement was erected has a right to have a lien on the improvement, apart from the ground. *Ib.*
3. *Kirkwood Mfg. & Sup. Co. v. Sunkel*, *ante*, followed. *Blake v. Sunkel*, 144.

**MERGER.** See *Mortgages*, 3, 4, 5, 7, 8.

**MORTGAGES.**

1. **Assumption of Incumbrance by Purchaser of Mortgaged Property.** A purchaser of land subject to a deed of trust, who agreed to pay a note secured thereby, became primarily responsible for the debt, instead of the maker, and any holder of the note could sue him thereon, and, the stipulation being for his vendor's benefit, the latter would be entitled to redress against him if damaged by his failure to pay. *Gerardi v. Christie*, 75.
2. **Payment or Purchase of Mortgage Evidence: Inferences.** Where a note and a deed of trust securing it were transferred, a check given by the transferee reciting it was in payment "for" and not "of" the note and deed of trust favors the insistence of the transferee that the transaction was a purchase and not a payment. *Ib.*
3. **Acquisition of Mortgaged Debt by Owner of Fee: Merger.** When the owner of the fee acquires an incumbrance for which he is primarily responsible, it is merged in the fee. *Ib.*

**MORTGAGES—Continued.**

4. **Same: Equity Follows Rule at Law.** Equity follows the rule of the common law as to merger, where the owner of a fee acquires an incumbrance for which he is primarily responsible, and the rule properly applies to a grantee who assumes an incumbrance created by his grantor, and subsequently buys it in. *Gerardi v. Christie*, 75.
5. **Same: Outstanding Title in Trustee.** An outstanding title in a trustee will prevent a merger of a deed of trust in the fee when the holder of the latter buys the secured debt, for he acquires no interest as regards the land, except to have it sold by the trustee in the event of a default—that is, he does not acquire an estate which will merge in the larger estate he holds already, but only a right. *Ib.*
6. **Assignment : Defenses Against Purchaser.** Where one holding title to a lot in trust for himself and associates and a corporation which they meant to form bought a note secured by a trust deed on the lot, defenses in favor of his associates or the corporation as against him, on the score that he acquired the note contrary to the trust, and other defenses growing out of their relation with him, except that of payment with their money, were collateral, unconnected with the note, and not available against one who purchased the note from him in good faith after maturity. *Ib.*
7. **Same: Merger.** A note secured by a trust deed of a lot was not paid by its purchase by one holding title to the lot in trust, if he bought it with his own money without intending to pay it, and hence he could sell it as the one from whom he bought could have done. *Ib.*
8. **Same.** Where the owner of the fee acquires title to an outstanding mortgage for which he is not individually responsible, no merger of the mortgage in the fee will be permitted if he intended there should be no merger when he acquired it, but, instead, that it should be kept alive for his benefit. *Ib.*

**MUNICIPAL CORPORATIONS.**

1. **Negligence: Injury on Sidewalk: Assumption That City Had Done Duty.** A person using a city sidewalk cannot presume that the city has done its duty in keeping the sidewalk in repair, when she knows it is in bad condition. *Howard v. New Madrid*, 57.
2. **Same: Duty of City.** A city is not bound, at all hazards, to keep its sidewalks in safe condition for travel, but it is only bound to use ordinary care to keep them in a reasonably safe condition for travel by day and night. *Ib.*
3. **Same: Presuming City Had Done Duty: Instructions: Harmless Error.** In an action against a city for injury received on a defective sidewalk, an instruction that plaintiff might presume that the city's duty had been performed by it and that the sidewalk was in a safe condition for use, was not prejudicial error, where there was no evidence tending to show plaintiff's contributory negligence. *Ib.*
4. **Same: Harmless Error, When.** In stating plaintiff might presume defendant had performed its duty and that the sidewalk

## MUNICIPAL CORPORATIONS—Continued.

was in a safe condition for use, committed prejudicial error on the issue of whether plaintiff used due care for her own safety, if there was any evidence tending to convict her of contributory negligence. *Howard v. New Madrid*, 57.

5. **Same: Contributory Negligence.** It is not negligence for a person to use a sidewalk which he knows to be in bad repair, unless it is so unsafe that no person of ordinary prudence would attempt to walk over it. *Ib.*

**NEGLIGENCE.** See *Common Carriers*, 12; *Master and Servant*, 7, 18, 19, 20, 21, 22, 23, 24; *Municipal Corporations*, 1, 2, 3, 4, 5.

1. **Runaway Horses: Inferring Negligence: Evidence.** Most decisions sustain the doctrine that negligence can not be inferred merely from the fact a team or horse ran away and caused damage, since runaways occur from the fright of horses, when those in charge of them are not at fault. *Fleishman v. Ice and Fuel Co.*, 117.
2. **Personal Injuries: Negligent Driving: Sufficiency of Evidence.** Where a driver drove his wagon against another wagon which was standing on the street, causing the tongue of the latter to swing around and strike a pedestrian, the accident happening in daylight and there being ample room in the street for a team and wagon to pass the standing wagon without striking it, the conclusion the driver was negligent is nearly irresistible. *Ib.*
3. **Inferring: Not Necessary to Exclude all Other Causes of Injury.** It is not the rule that negligence can be inferred as the cause of an accident from the facts of the occurrence only when all other possible causes are excluded, for it is conceivable in practically every instance the accident might, within the range of possibility, have been due to something else. *Ib.*
4. **Same: Res Ipsa Loquitur.** If the instrumentality that did the damage was under the management of a person and the accident was such as does not happen in the ordinary course of events, when the instrumentality which caused it is handled with due care, an inference of negligence may be drawn from the testimony. *Ib.*
5. **Personal Injuries: Negligent Driving: Evidence: Physical Facts.** In an action for personal injuries, plaintiff's evidence tended to prove that a wagon, standing on the east side of a street, with the tongue rigid and pointing northward, was struck by a north-bound wagon, causing the tongue of the standing wagon to swing around and strike plaintiff, who was walking north on the east side of said street, on her right side. *Held*, this was by no means an impossible accident and though plaintiff testified the tongue hit her on the right side as it swung from the left, it may have happened she was facing obliquely at the moment, so that her right side was the more exposed to a blow. *Ib.*
6. **Same: Ownership: Name on Wagon.** Evidence that defendant's name was on the wagon which collided with the standing wagon was competent to show that such wagon was in charge of defendant's servants, and that they were acting in the course of their employment at the time. *Ib.*



## NEGLIGENCE—Continued.

7. **Same.** Perhaps proof of the name on the wagon alone would carry the case to the jury on the issue of defendant's liability. *Fleishman v. Ice and Fuel Co.*, 117.
8. **Same: Authority of Servants: Evidence Held Sufficient: Facts Stated.** In addition to proving that defendant's name was on the wagon which collided with the standing wagon, it was proved it was similar to many wagons used by defendant and used in its business and seen in its yard in the immediate vicinity of the accident; that the wagon was coming from the direction of said yard at the time; that no other concern used similar wagons. Defendant offered no evidence to prove the wagon did not belong to it, was not in charge of its servants, or, if it was, that the servants were not in the performance of a task for defendant at the time, but engaged upon some purpose of their own. Defendant sent a physician to examine plaintiff and ascertain the extent of her injuries. *Held*, the evidence was sufficient to establish prima-facie that the wagon which caused plaintiff's injury was owned by defendant, was in charge of its servants, and they were engaged in its service when the collision occurred. *Ib.*
9. **Same: Instructions.** In an action for personal injuries through the negligent driving of defendant's wagon, an instruction requiring the jury to find only that the wagon was in charge of defendant's servants, and omitting to require a finding that they were engaged at the time in the course of their employment, was erroneous; plaintiff's evidence on the latter point not being sufficient to permit more than inferences. *Ib.*
10. **Same: Inferences for Jury.** In an action for personal injuries, where the questions of the defendant's ownership causing the injury and its responsibility for the servant in charge of it are contested issues of fact, and the evidence for the plaintiff is only sufficient to permit inferences by the jury, the defendant is entitled to have the jury weigh such evidence and find from it what they deem were the probable facts. *Ib.*
11. **Same.** While it is true the courts have held defendants in like cases are called on to exonerate themselves by testimony to show the culpable persons were not their employees, or were not in their line of duty, and have said those facts would be presumed, what is meant is, that it is incumbent on a defendant to show those facts in defense, after the plaintiff has shown prima-facie to the contrary, and the word "presumed" is used in the sense of "inferred" and does not signify the inference was compulsory, but that it might be made by the jury. *Ib.*
12. **Damages: Fright and Mental Anguish.** In an action for negligence no cause of action exists for a mere mental disturbance, such as fright or anguish, not resulting from a physical injury, unless it be under circumstances of malice, insult or inhumanity directed against the plaintiff. *Bouillon v. Gas Light Co.*, 463.
13. **Pleading: Res Ipsa Loquitur: Effect of Pleading Specific Negligence.** By pleading specific acts of negligence, plaintiff asserts his ability to prove the same as laid, and for that reason he is required to do so even though the doctrine of *res ipsa loquitur* might apply under a general allegation unaccompanied by averments of such specific acts. *Gibler v. Railroad*, 475, 148 App.—50.

**NEGLIGENCE—Continued.**

14. **Railroads: Res Ipsa Loquitur: Doctrine Applies When.** The doctrine of *res ipsa loquitur* applies where it appears a railroad train is under the management of defendant and the accident is such as in the ordinary course of events does not happen if those managing the conveyance use proper care, the accident under such circumstances affording reasonable evidence in the absence of explanation of defendant, that it arose from want of care on the part of defendant. *Gibler v. Railroad*, 475.
15. **Pleading Res Ipsa Loquitur: Effect of Pleading General and Specific Negligence.** Where there is a general allegation in the petition as to the negligent breach of duty, accompanied by averments of specific acts of negligence touching the same subject-matter, the rules of *res ipsa loquitur* will not apply, for by going into the specification of negligent acts, plaintiff has shown his familiarity with the grounds of liability involved and indicated not only his purpose but his ability to prove the same as laid. *Ib.*

**NEGOTIABLE INSTRUMENT LAW.** See Bills and Notes, 1, 2, 3, 4.

**NOTICE.** See Judicial Sale, 3.

**Constructive Notice.** One has no right to shut his eyes to facts easily ascertainable and then claim to escape the consequences, nor has one the right, knowing the facts or having every opportunity to know them, to accept from another a misstatement and then claim the benefit of it. *Clarke v. Cooper*, 230.

**PARTIES.** See Corporations, 1, 4; Infants, 3; Prohibition, 1.

1. **Capacity to Sue: Properly Raised by Demurrer: Pleading.** The objections that a plaintiff, suing as next friend of infants, was not appointed by the court as provided by statute, is not waived by not making a special appearance, where the petition was demurred to on that ground. *Brewer v. Cary*, 194.
2. **Necessary Parties: Interpleaders for Fund.** Where under an agreement, a sum of money was deposited to protect a purchaser from judgments outstanding against the depositors, all of the judgment creditors named in the agreement were necessary parties to an action by the depositors to recover the same, and where part of them were not served either personally or by publication, it was error to render judgment for payment of a part of the fund to the other creditors, leaving the balance undisposed of by the judgment. *O'Connell v. Transit Co.*, 416.
3. **Misjoinder: When to be Raised by Answer.** A misjoinder not apparent on the face of the petition can be taken advantage of by answer only. *Reifschneider v. Beck*, 726.
4. **Same: Waiver.** Under section 602, Revised Statutes 1899, misjoinder of parties is waived unless raised by demurrer or answer. *Ib.*

**PERSONAL INJURIES.** See Negligence, 5, 6, 7, 8, 9, 10, 11.

**PETITION.** See Executors and Administrators, 4; Pleading, 1.

**PLEA IN ABATEMENT.** See Trial Practice, 2.

**PLEADING.** See Appellate Practice, 20; Common Carriers, 14, 15, 24; Corporations, 12; Executors and Administrators, 4; Judgment, 4; Justices' Courts, 1; Libel and Slander, 8; Livery Stable Keepers, 3; Negligence, 13, 15; Parties, 1; Trial Practice, 2, 6.

1. **Petition: Construction.** The intendments of a petition must be taken most strongly against plaintiff, especially where a default has occurred. *White v. McFarland*, 339.
2. **Judgment on Pleading: Issues of Fact.** Where a sum of money was deposited with a trust company to protect a purchaser from the depositors against judgments against them, and, in an action to recover the deposit a holder of one of the judgments pleaded the judgment and its assignment, to which the depositors pleaded the invalidity of the judgment, and that it was barred by limitation, it was error to render judgment on the pleadings in favor of the holder of the former judgment without an examination of the facts. *O'Donnell v. Transit Co.*, 416.
3. **Amendments: Time.** That an amended answer was tendered on the day the case was set and called for trial was not ground for refusing it. *Stove Repair Co. v. Cornwall*, 606.
4. **Prayer: Does not Control Relief to be Granted.** Generally speaking, the prayer for relief in a pleading does not control the form of relief to be granted, but any relief consistent with the facts alleged may be granted. *Bick v. Dixon*, 703.
5. **Same: Change in Prayer: Departure.** It is not conclusive on the question whether an amended petition changes the cause of action first stated that it closes with a prayer materially different from the prayer of the original petition, if the two pleadings are otherwise alike. *Ib.*
6. **Same: Governs Relief Granted, How Far.** The prayer of a petition may sometimes determine the character of the proceeding and the relief that may be accorded, and this is so when the petition states facts consistent with the prayer for relief, which is specific, and to grant relief not prayed for and not contemplated by plaintiff in stating his case would surprise defendant and deprive him of some right of procedure he is entitled to. *Ib.*
7. **Action on Judgment: Changing Prayer for Relief: Departure.** In an action on a justice's judgment, where the prayer of the first petition contained words suggestive of a proceeding to revive the justice's judgment and also words suggestive of a suit upon said judgment but did not pray for a writ of *scire facias* and no such writ was issued, an ordinary summons being issued, the case stood as an action on the justice's judgment, and an amended petition which differed from the original one only in the omission of words appropriate in a prayer to revive a judgment by *scire facias*, did not change the cause of action. *Ib.*

**PRESUMPTION.** See Corporations, 5; Deeds.

**PRIMA FACIE CASE.** See Assault and Battery, 5.

**PRINCIPAL AND AGENT.** See *Replevin*, 1, 2

**Contract With Agent: Liability of Agent.** In an action for damage for refusal to permit plaintiff to carry out a contract to excavate and remove dirt from a lot on which defendant, as architect was supervising the erection of a building for another, where plaintiff testified he understood the house and lot belonged to the principal and that defendant was there for the purpose of putting up the building as architect and that he was agent for the property and represented the owner, defendant could not be held on the theory he was personally bound because he did not disclose to plaintiff who the principal was. *Doman v. Pendleton*, 489.

**PROBATE COURTS.** See *Executors and Administrators*, 9, 11; *Mandamus*, 1.

**PROHIBITION.** See *Appeals*.

1. **Parties: State not Necessary Party.** Under section 4450, Revised Statutes 1899, providing that proceedings for prohibition shall be by civil action in which the moving party is plaintiff and the adverse party defendant, the State is not a necessary party. *Ostmann v. Frey*, 271.
2. **Functions of Writ.** The writ of prohibition goes only from a superior court to an inferior tribunal to the end of preventing or staying judicial proceedings without or in excess of the jurisdiction of such inferior tribunal, and it will not lie to prevent the execution of a mere ministerial act by a ministerial officer, and as a general rule will not go against judicial officers in performing mere ministerial duties. *Ib.*
3. **Constable: Levying Execution Ministerial Act.** A constable is a ministerial officer and the act of levying an execution in his hands is ministerial, and prohibition will not lie to prevent his doing so. *Ib.*
4. **Justices' Courts: Issuance of Execution: Judicial Act.** The issuance of an execution by a justice of the peace is a judicial and not a ministerial act, and prohibition is available to prevent him from issuing the writ if it appears he is proceeding without or in excess of his jurisdiction. *Ib.*
5. **Proceedings in Lower Court, After Appeal.** As a general rule, prohibition is available to prevent further proceedings in execution of the judgment of an inferior tribunal when that judgment has been superseded by a proper appeal and appeal bond. *Ib.*
6. **Same: Justice's Court.** Prohibition will not lie against a court of inferior jurisdiction, such as a justice's court, where it appears such court was possessed of complete jurisdiction in the first instance and has exhausted its judicial power in the premises, for in such case there is nothing of a judicial character upon which the prohibition may operate. *Ib.*
7. **Preventive Remedy.** Prohibition is a preventive, rather than a corrective, remedy, and issues only to prevent the commission of a future act and not for the purpose of undoing an act already performed. *Ib.*

**PROHIBITION—Continued.**

8. **Justices' Courts: Preventing Enforcement of Execution.** Where after an appeal had been taken from a judgment rendered by a justice of the peace, he issued an execution prohibition would not lie to correct his error, his judicial power having been exhausted by issuing the execution. *Ib.*

**PROXIMATE CAUSE.** See Common Carriers, 16.

**PUBLIC POLICY.** See Husband and Wife, 3.

**QUESTION OF FACT.** See Common Carriers, 16.

**RAILROADS.** See Master and Servant, 14, 15, 16, 17; Negligence, 14.

**REAL ESTATE BROKERS.**

1. **Contract of Employment: Construction.** A contract employing a broker to procure a purchaser, which stipulates that, if a sale or exchange of the property is made while in charge of the broker, the owner will pay for his services a commission on the price, and which gives the owner the right to terminate the agency on thirty days' notice, does not reserve to the owner the right to himself sell the property during the agency without paying a commission. *Trust Co. v. Lamar*, 353.
2. **Same: Bilateral Agreement.** Where the contract employing a broker to procure a purchaser was not signed by the broker, but he acted under it and advertised the property, the agreement was bilateral. *Ib.*
3. **Same: Construction.** A contract employing a broker to procure a purchaser, which stipulates that, if a sale or exchange is made, while the property is in charge of the broker, the owner will pay for his services a commission on the price, and which reserves to the owner the right to terminate the agency on thirty days' notice, binds the owner to pay the commission where he sells the property during the agency, but does not bind him to make a sale during the agency unless a buyer is found by the broker; so that where, before the termination of the agency, the owner contracted to sell but deferred the execution of the deed until after the termination of the agency, he was liable for the commission, and, where he refused to agree to sell until after the termination of the agency, he was not liable for a commission on a sale subsequently made. *Ib.*
4. **Right of Recovery: Conflicting Evidence: Peremptory Instruction for Plaintiff Held Erroneous.** In an action by a broker for commission due on a contract stipulating for a commission on a sale or exchange made while the property is in charge of the broker, evidence held to require submission to the jury of the issue whether the owner contracted to sell during the agency, but deferred the execution of the deed until after the termination of the agency, which would authorize a recovery for plaintiff, or whether the owner refused to agree to sell until after the termination of the agency, thereby relieving himself from liability for commission on a sale subsequently made, and the giving of a peremptory instruction to find for plaintiff was therefore error. *Ib.*

**REAL ESTATE BROKERS—Continued.**

5. **Commissions for Making Loan: Performance by Broker.** In an action by an agent to recover commission for securing a loan on defendant's property where the proposed lender secured by the agent would not lend the money on the conditions provided in the contract of agency, but insisted upon a compliance with other conditions, the agent was not entitled to recover. *Oellien v. Duncan*, 600.

**REFERENCE.**

**Involved Accounts.** A suit for work and material in erecting buildings was properly referred, with or without consent of the parties, where it involved the examination of a very long account with which it would have been difficult for a jury to deal intelligently. *Reifschneider v. Beck*, 725.

**REPLEVIN.** See *Executors and Administrators*, 2, 3; *Instruction*, 4.

1. **Recovery of Note Discounted: Principal and Agent: Authority of Agent to Transfer Premium Note: Life Insurance.** An agent of plaintiff, an insurance company, took an application for life insurance and a note in which he was named as payee for the first premium, and executed a receipt for the note, containing an agreement that if the policy was not issued in sixty days after examination by the insurance company's physicians, the note would be returned on surrender of the receipt. The note was given on Saturday, and the agent left it with plaintiff until Monday, when he called for it, stating that he wished to negotiate it. He transferred it to defendant, a bank, and received credit for the amount. Plaintiff never accepted notes for premiums, and whenever an agent took a note, he was charged with the premium, and if the company received the note, it only held it as collateral for the premium. Defendant bank, when it bought the note, knew it had been given for an insurance premium. Owing to a change of management in plaintiff insurance company before the issuance of the policy, the risk was refused, and it then brought replevin against the bank to recover the note. *Held*, that the agent had the power to discount the note, and there being no evidence of fraud on his part, replevin would not lie to recover it. *Life Insurance Co. v. Bank*, 551.

2. **Same: Instructions.** In such a case where the court instructed the jury to return a verdict for plaintiff if they found it was the owner of and entitled to possession of the note at its date and found from the evidence that defendant knew when it was discounted, or by ordinary care could have known, that the agent had no authority to discount it; or, secondly, if the jury found defendant knew, or by ordinary care could have known, that the note was the property of plaintiff, and not that of the agent, or, thirdly, if the jury found the note was received by the agent as agent, and defendant knew, or by ordinary care could have known, he had no authority to indorse and discount it, the second charge was inconsistent with the third and all three were inconsistent with the evidence. *Ib.*

**RES ADJUDICATA.** See *Judgment*, 4, 5.

**RES IPSA LOQUITUR.** See *Master and Servant*, 15, 17; *Negligence*, 4, 13, 14, 15.

**SALES.** See Corporations, 15, 16, 17.

1. **Mistake of Vendee as to Value.** A mistake in value of the thing purchased is rarely a ground for setting aside any sale, except where there is positive proof of fraud or deception by which the vendee was induced to give a larger price for the article purchased than it was worth, or where the imposition in value is so great as to shock the conscience. *Clarke v. Cooper*, 231.
2. **Fraud and Deceit: Rescission of Contract: Silence as to Defects.** For silence in respect to a defect in an article sold to be ground for rescission by the buyer, when he buys on his own judgment and no warranty is given, and silence must be attended by circumstances rendering it a fraud; there must be some agreement or relationship that makes it the duty of the seller to divulge the defect. *Overhulser v. Peacock*, 504.
3. **Same: Facts Stated.** Where a seller stated that if the horse were sound the price would be \$200, and accepted a much lower price and told the buyer the horse had had the distemper which had left its wind a little heavy, and the buyer saw the horse and thoroughly inspected him and brought on his own judgment after the seller had made said statements, which should have induced the most cautious examination, the mere silence of the seller in not stating that the horse had the heaves would not *ipso facto* be a fraud, and the question where the seller was guilty of fraudulent concealment was one for the jury, there being ample evidence that no fraud was intended or practiced. *Ib.*
4. **Implied Warranty.** The doctrine of warranty of fitness has no application in such a case; but at any rate there was no such warranty against defects discoverable by an inspection of ordinary care. *Ib.*
5. **Instructions: Refusal: Issues Ignored.** In a suit against an individual on account of goods sold to a company, an instruction that plaintiff could not recover if it was agreed between plaintiffs and defendant's agents that the sale was to the company was properly refused, as ignoring the real issue whether defendant promised to pay for the goods. *Flooring Co. v. Knost*, 563.
6. **Sale to Corporation: Liability of Agent.** That part of the goods was delivered to the company before defendant agreed to pay therefor did not release him from liability for the part delivered afterwards. *Ib.*
7. **Instructions: Modification: Failure to Define "Binding Contract."** In a suit against an individual on an account for goods sold a company, an instruction basing the recovery on a "binding contract" to buy was properly modified so as to base the recovery on plaintiff's reliance on a mutual agreement between plaintiff and defendant that if plaintiff would sell the goods defendant would pay for them. It would have been error to have told the jury they must find there was "a binding contract," without defining that term. *Ib.*
8. **Terms.** The buyer may purchase upon any terms he proposes if the seller assents thereto. *Sherman v. Shaughnessy*, 679.

**SCIRE FACIAS.** See Judgments, 6.

**SPECIFIC PERFORMANCE.** See Husband and Wife, 2, 3, 4, 5.

**STATUTE OF FRAUDS.** See Trusts, 4.

1. **Exchange of Real Estate: Complete Performance.** A contract for exchange of real estate is taken out of the Statute of Frauds by its complete execution or performance. *Bauer v. Implement Co.*, 652.
2. **Stranger Cannot Set Up.** A stranger to a contract cannot set up the Statute of Frauds against it. *Ib.*

**STATUTES.** See Appellate Practice, 16; Common Carriers, 29; Crimes and Punishments, 2; Dismissal of Suits, 1; Evidence, 3; Guardian and Ward, 1; Landlord and Tenant, 1.

**Construction: Acts in Pari Materia.** Sections of statutes relating to the same subject-matter should be construed together in determining their meaning. *Robert v. Railroad*, 97.

#### STATUTES CITED AND CONSTRUED.

##### Revised Statutes, 1909.

Section 1855, see page 305.

1979, see page 307.

1980, see page 305.

##### Revised Statutes, 1899.

Section 7, see pages 715, 723.	Section 3494, see pages 193, 202.
9, see pages 715, 723.	3649, see page 287.
42, see pages 715, 723.	4019, see pages 537, 540.
365, see pages 679, 688.	4073, see page 456.
415, see pages 145, 151.	4074, see page 456.
548, see page 561.	4076, see page 456.
550, see pages 194, 209.	4110, see pages 69, 70,
551, see pages 194, 209.	73.
553, see pages 194, 209.	4207, see page 140.
602, see pages 726, 740.	4278, see page 539.
657, see pages 725, 741.	4448, see page 275.
697, see page 733.	4449, see page 275.
699, see page 734.	4450, see pages 271, 275.
1312, see page 688.	4451, see page 275.
1557, see pages 452, 457.	4452, see page 275.
1979, see pages 298, 305.	4453, see page 275.
2259, see page 372.	4454, see page 275.
2429, see page 278.	4455, see pages 271, 275.
2430, see page 278.	4456, see page 275.
2873, see pages 475, 485.	5022, see pages 693, 699.
3416, see pages 493, 502.	6642, see pages 34, 43.
3480, see pages 193, 201.	6643, see page 48.
3481, see pages 193, 201.	8012, see pages 259, 271.
3482, see pages 193, 201.	

Art. 3, Chap. 22, see page 615.

##### Revised Statutes, 1889.

Section 5281, see page 203.



**STATUTES CITED AND CONSTRUED—Continued.****Annotated Statutes, 1906.**

Section 639, see page 305.	Section 4450, see page 275.
664, see page 305.	4451, see page 275.
797, see pages 305, 307.	4452, see page 275.
3649, see page 287.	4453, see page 275.
4073, see page 456.	4454, see page 275.
4074, see page 456.	4455, see page 275.
4075, see page 456.	4456, see page 275.
4448, see page 275.	Page 530, see page 558.
4449, see page 275.	

**Laws, 1907.**

Page 231, section 2, see pages 614, 617.

**Laws, 1905.**

Page 54, see pages 693, 699.

95, see pages 559, 561.

243, see pages 1, 15.

**Laws, 1903.**

Page 251, see pages 385, 386.

252, see pages 385, 386.

**Laws, 1901.**

Page 46, see pages 164, 168.

219, sec. 1, see pages 384, 387.

**TORTS.**

**Nature and Elements in General.** As a general proposition, torts are wrongs committed wholly irrespective of contract; but a tort may arise in connection with a breach of contract by a common carrier, where the law lays an obligation upon the carrier to perform his duties in the premises arising from the contract and this obligation is breached, and in such case there is an obligation imposed both by contract and by law upon the carrier, and the breach of the contract operates as a "tort" though entailing as well a breach of the obligation imposed by law, and the tort though independent of, is in a measure dependent on, the contract. *Trout v. Livery and Undertaking Co.*, 622.

**TRESPASS.**

1. **Entering House.** Although an agent of a gas company had the right to enter a basement where a gas meter was kept, he had no right to enter or pass through a flat of a person who was not a consumer of gas for the purpose of gaining access to such basement. *Bouillon v. Gas Light Co.*, 462.
2. **Damages: Consequences of Tort.** A trespasser is liable for such injuries as result naturally, necessarily, and proximately from his wrongful act. *Ib.*
3. **Collector Entering House Against Protest: Violent Language: Damages: Fright and Mental Anguish Recoverable Elements: Anticipation of Result.** Fright and mental anguish arising

**TRESPASS—Continued.**

from a trespass to person or property as well as physical injury resulting from fright are proper elements of damage in an action for trespass, whether or not the wrongdoer reasonably anticipated the result of his trespass, so that, where defendant's agent wrongfully entered plaintiff's flat to read a gas meter which was in fact in a part of the house not occupied by plaintiff, and caused her to have a miscarriage by frightening her by the use of violent language to her nurse, plaintiff could recover damages for the miscarriage resulting from the fright, and mental anguish caused by the trespass, though defendant's agent did not know plaintiff was confined because of pregnancy. *Bouillon v. Gas Light Co.*, 462.

4. **Willful and Malicious: Intent of Trespasser.** Where a trespass is willful and malicious, or of such a character or committed under such circumstances as to render it liable to commit injury to person or property, the trespasser is liable to the person injured although he had no intent to do any injury. *Ib.*

**TRIAL PRACTICE. See Appellate Practice, 20.**

1. **Dismissing Appeal from Justice's Court: Improper to Exercise Jurisdiction when Appeal Dismissed.** On an appeal from a justice's court to the circuit court in an attachment suit, where the appeal was dismissed for lack of jurisdiction in the circuit court in consequence of the justice from whom the appeal was taken having no jurisdiction, it was improper to overrule a motion filed by appellant to establish the priority of his lien, since that act was an exercise of jurisdiction. *Thompson v. Paddock*, 145.
2. **Pleading: Plea in Abatement: Separate Trial of.** In an action on an account stated and also for the price of goods sold and delivered where all matters alleged in a so-called "plea in abatement" were properly set up in the answer and amounted to nothing more than a denial of indebtedness to plaintiff, and the issue tendered by such plea, contained in the answer, was nothing more than could have been given in evidence under the general denial, a trial on such plea separate from the trial of the merits was not necessary. *Loan, Storage & Mercantile Co. v. Farbstein*, 216.
3. **Bill of Exceptions: Allowing Exceptions: Custom of Court.** The rule that exceptions must always be saved at the time the error complained of is committed is more immediately for the protection of the trial court, hence the action of the trial judge pursuant to a well understood rule that counsel were assumed to have excepted to the giving and refusing of instructions, in allowing exceptions to instructions and embodying them in the bill, which he signed, although the official stenographer's notes did not show such exception, will not be interfered with by the appellate court, as the signing of a bill of exceptions by the trial judge is tantamount to a finding by him that he allowed the exceptions therein contained and that they had been duly preserved. *Ib.*
4. **Conflicting Evidence: Question for Jury.** Where there is a substantial testimony on both sides of an issue, the jury must pass on the credibility of the evidence as a whole. *Trust Co. v. Lamar*, 354.

## TRIAL PRACTICE—Continued.

5. **Discretion of Trial Court: Allowing Amendments: Appellate Practice.** The trial court has a sound discretion in allowing amended pleadings to be filed or pleadings to be withdrawn, down to the time of judgment, and even thereafter under the Statute of Jeofails, in furtherance of justice, etc.; and the appellate court will not interfere with the exercise of this discretion, unless it appear to have been unwisely exercised. *Stove Repair Co. v. Cornwall*, 605.
6. **Reception of Evidence: Offers of Proof: General Offer.** A general offer of testimony on certain questions is bad practice as liable to lead to confusion, and the court may and should refuse such offers and require the introduction of the witnesses themselves, so that the line of proof may be determined from the questions asked and thus permit intelligent rulings on the evidence; and hence defendant's offers of proof were probably refused, where he announced that he did not have the witnesses present to testify in support of the answer, but would secure them in a few moments. *Ib.*
7. **Fraud and Deceit: Failure to Plead: Theory at Trial: Instructions.** In an action of replevin, where plaintiff claims title through a contract made by him with a third person, defendant was not entitled to an instruction submitting the issue of the contract having been induced by fraud, not having pleaded fraud, and having tried the case, not on the theory that the contract was so induced, but that it was rescinded. *Bauer v. Implement Co.*, 652.

## TRUSTS. See Attorney and Client, 2, 3.

1. **Incumbrance on Trust Property: Rights and Liabilities of Trustee.** Though one who held title to a lot in trust for himself and associates and a corporation which they meant to form, and who was not bound to pay for it out of his own funds, but with money furnished by his associates or to be raised on bonds of the corporation secured by a deed of trust on the lot, was bound, as against other parties in interest by his contract with his vendor to discharge a note secured by a trust deed of the lot, he was not bound to do so as against his associates or a subsequent purchaser at a sale of the lot under another trust deed, but while he stood in a fiduciary capacity to his associates or to the corporation, he could not lawfully hold the note which he acquired and dispose of it to the prejudice of the corporation, or so as to deprive it of the right to pay it and discharged the lien. *Gerardi v. Christie*, 76.
2. **Same.** One holding title to a lot in trust for himself and others had an interest therein which warranted him to acquire a note secured by a trust deed on the lot, if necessary to prevent a sale under the deed, and, if he purchased the note, he was not a mere volunteer in the transaction. *Ib.*
3. **Resulting Trust: Facts Stated do not Establish.** Plaintiff's intestate sold land, retaining a vendor's lien for the price, and the vendee afterwards borrowed a certain sum, giving a first deed of trust, and paid such amount to intestate, and executed notes secured by a second trust deed for the balance. The land was sold under the first trust deed for default. Plaintiff and the heirs decided not to purchase at the sale to protect the second trust deed, but defendant's intestate, the attorney

**TRUSTS—Continued.**

for plaintiff as administrator, purchased the property at the foreclosure sale with his own money without plaintiff's knowledge. *Held*, that a defendant's intestate did not hold the land, or the proceeds of its resale, as a constructive trustee. *Ewing v. Parrish*, 492.

4. **Trust in Land: Oral Declaration: Statute of Frauds.** To declare an express trust in land on a verbal declaration would contravene the Statute of Frauds (section 3416, Revised Statutes 1899), making all declarations of trust of any land void unless manifested and approved by writing and signed by declarant. *Ib.*
5. **Trust in Personalty: Oral Declaration.** A trust in personalty may be established orally. *Ib.*
6. **Action Against Trustee: Money Had and Received.** An action for money had and received will sometimes lie in favor of the *cestui que trust* against the trustee, but where the trust is disputed and the amount the trustee owes unsettled, the remedy is in equity. *Ib.*

**VARIANCE.** See *Common Carriers*, 15.

**VENUE.**

**Jurisdiction: Suit Affecting Title to Land.** A suit to restrain the sale of land under a trust deed, on the ground the mortgagee, in seeking to relieve himself of the requirements of the third constitutional amendment of 1900 requiring him to pay taxes on the mortgage debt, induced the mortgagor to execute the notes and the mortgage securing them to secure and guarantee the payment of all taxes on the property and on the mortgage debt during the existence of the debt, and that the makers of the notes had paid all the taxes, and that neither the mortgagee nor his assignee had at any time paid any of the taxes, so that there was no consideration for the notes, is not a suit whereby title to real estate may be affected, which under the statute must be brought in the county where the real estate is situated. *Briscoe v. Longmire*, 594.

**VERDICT.** See *Appellate Practice*, 10; *Damages*, 1, 3.

**WAIVER.** See *Appellate Practice*, 13; *Parties*, 1.

# Rules Governing Practice in the Kansas City Court of Appeals.

*It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:*

**RULE 1.—Presiding Judge.** The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

**RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.**

**RULE 3.—Hearing of Causes.** No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

**RULE 4.—Taking Records from Clerk's Office.** Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

**RULE 5.—Diminution of Records.** No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

**RULE 6.—Certiorari to Perfect Record.** Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

**RULE 7.—Notices of Writs of Error.** All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

**RULE 8.—Review of Instructions on General Statement of Evidence.** In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that

## KANSAS CITY COURT OF APPEALS.

"evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

**RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court.** If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

**RULE 10.—Evidence—Bill of Exceptions to be Allowed, When.** If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

**RULE 11.—Exceptions—Questions to be Embodied in Bill.** When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

**RULE 12.—Duty of Circuit Court Clerks in Making Transcripts.** The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the ——— day of ———, 188—, executed on the ——— day of ———, 188—;*" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

**RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence.** The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the

## KANSAS CITY COURT OF APPEALS.

court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

**RULE 14.—Bill of Exceptions in Equity Cases.** In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

**RULE 15.—Abstract and Briefs to be Filed and Served.** In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

**RULE 16.—Citing Authorities in Briefs.** In compliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may

## KANSAS CITY COURT OF APPEALS.

adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

**RULE 17.—Appellant's Brief to Allege Errors Complained of.** The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

**RULE 18.—Penalty for Failure to Comply with Rule 15.** If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

**RULE 19.—Agreed Statement of the Cause of Action.** Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

**RULE 20.—Motion for Rehearing.** Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

**RULE 21.—Motion for Affirmance.** On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the



## KANSAS CITY COURT OF APPEALS.

transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

**Rule 22.—Extending Time for Filing Statements, Abstracts, Etc.** In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

**Rule 23.—Oral Arguments.** When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

**Rule 24.—Notice on Motion to Dismiss or Affirm.** A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

**Rule 25.—When Appeal is Returnable—Certificate of Judgment—Transcript.** In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

Attest:

L. F. McCOY, Clerk.

# Rules of Practice in the St. Louis Court of Appeals.

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REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

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**Rule 1.—Presiding Judge.** The Presiding Judge shall superintend all matters of order in the Court Room.

**Rule 2.—Words Appellant and Respondent, What They Include.** Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

**Rule 3.—Motions.** All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

**Rule 4.—Hearing of Causes.** Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

**Rule 5.—Diminution of Record.** No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

**Rule 6.—Certiorari to Perfect Record.** Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

## ST. LOUIS COURT OF APPEALS.

**Rule 7.—Notice of Writs of Error.** All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

**Rule 8.—Reviewing Instructions.** For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

**Rule 9.—Bills of Exceptions in Equity Cases.** In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

**Rule 10.—Duty of the Clerk in Making Up Transcripts.** The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the \_\_\_\_\_ day of \_\_\_\_\_ 190—, executed on the \_\_\_\_\_ day of \_\_\_\_\_, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

**Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence.** The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

**Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served.** In those cases where the appellant shall, under the provisions of section 813, Revised Statutes of 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstracts above referred to and of any

## ST. LOUIS COURT OF APPEALS.

objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

**Rule 13.—Printed Transcripts.** A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

**Rule 14.—Abstracts—When Filed and Served.** In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

**Rule 15.—Abstracts, What They Shall Contain.** Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

**Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript.** In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes 1899, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

## ST. LOUIS COURT OF APPEALS.

the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

**Rule 17.—Costs, When Allowed for Printing Abstracts and Records.** Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

**Rule 18.—Briefs, What to Contain and When Served.** The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

**Rule 19.—Citing Authorities in Brief.** In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

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Authorities incorrectly cited as to book, page or title of case, will be disregarded.

**Rule 20.—Extension of Time.** Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

**Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18.** If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

**Rule 22.—Agreed Statement of Cause of Action.** Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

**Rule 23.—Motions for Rehearing.** Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. See *Barnett et al. v. Colonial Hotel B. Co.*, 119 S. W. 471; 137 Mo. App. 636.

Rule 24 is hereby amended to read as follows:

**Rule 24.—Oral Arguments.** When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, and if he has not consumed all of his time in opening. The whole time consumed by either party in statement and argument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a Justice of the Peace, the time for argument shall not exceed thirty (30) minutes on each side.

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Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court *in extenso* the written or printed argument on file, nor from reports or text books.

The above rule to be in force and effect on and after June 6, 1910.

**Rule 25.—Notice on Motion to Dismiss or Affirm.** A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

**Rule 26.—Motion for Affirmance.** On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

**Rule 27.—Appearance of Counsel.** The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

**Rule 28.—Allowance to Garnishees.** Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

**Rule 29.—Service of Abstracts and Briefs in Criminal Cases.** The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

## ST. LOUIS COURT OF APPEALS.

ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

**Rule 30.—Return of Original Writs.** Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

**Rule 31.—Withdrawing Records.** No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

**Rule 32.—Repeal of Former Rules.** All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

**Rule 33.—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.**

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.



# RULES OF PRACTICE

## IN THE

### SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

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**RULE 1.—Presiding Judge.** The Presiding Judge shall superintend all matters of order in the court room.

**RULE 2.—Words Appellant and Respondent, what they include.** Whenever the word appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

**RULE 3.—Motions.** All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

**RULE 4.—Hearing of Causes.** Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

**RULE 5.—Diminution of Record.** No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

**RULE 6.—Certiorari to Perfect Record.** Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

**RULE 7.—Notice of Writs of Error.** All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

**RULE 8.—Reviewing Instructions.** For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove,

## SPRINGFIELD COURT OF APPEALS.

then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

**RULE 9.—Bills of Exceptions in Equity Cases.** In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

**RULE 10.—Duty of the Clerk in Making up Transcripts.** The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—," and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

**RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence.** The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

**RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served.** In those cases where the appellant shall, under the provisions of section 813, Revised Statutes of 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time.

**RULE 13.—Printed Transcripts.** A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule, and dispense with the necessity of any further transcript.

**RULE 14.—Abstracts, when Filed and Served.** In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty

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days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

**RULE 15.—Abstracts, what they shall contain.** Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned. Provided: In all cases wherein there are statements or other evidence in the printed abstract of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal and bill of exceptions, and any statement purporting to show that the action of the court on the same was taken in proper time, such abstract shall be deemed sufficient as to such matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be sufficient to state that the abstract does not show such steps were taken in proper time, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time, as the case may be, and thereupon, the Court shall determine the matter and the costs thereof taxed as the Court shall deem just. (Amendment to take effect August 1, 1910.)

**RULE 16.—When Appeal is Returnable; Certificate of Judgment; Transcript.** In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes 1899, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

**RULE 17.—Costs, when Allowed for Printing Abstracts and Records.** Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which

## SPRINGFIELD COURT OF APPEALS.

the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

**RULE 18.—Briefs, what to Contain and when Served.** The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

**RULE 19.—Citing Authorities in Briefs.** In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

**RULE 20.—Extension of Time.** In no case will extension of time for filing statements, abstracts, or briefs be granted except upon affidavit showing satisfactory cause.

**RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18.** If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

**RULE 22.—Agreed Statement or Cause of Action.** Parties may, in the courts of first instance, agree upon any statement of the

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cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

**RULE 23.—Motions for Rehearing.** Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

**RULE 24.—Oral Arguments.** When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant in error replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

**RULE 25.—Notice on Motion to Dismiss or Affirm.** A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

**RULE 26.—Motion for Affirmance.** On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

**RULE 27.—Appearance of Counsel.** The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the ap-

## SPRINGFIELD COURT OF APPEALS.

pellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

**RULE 28.—Allowance to Garnishees.**—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

**RULE 29.—Service of Abstracts and Briefs in Criminal Cases.** The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

**RULE 30.—Return of Original Writs.** Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

**RULE 31.—Withdrawing Records.** No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

Adopted this 19th day of August, 1909.

## ERRATA.

In Vol. 135, at page 644, *Doss v. Railroad*, should read: P. B. Jackson for Appellant; John M. Barker for Respondent.











**HARVARD LAW LIBRARY**

